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IN THE

United States Circuit Court of Appeals for the Ninth Circuit

M. A. PHELPS LUMBER COMPANY, a corporation,
Appellant,

vs.

McDONOUGH MANUFACTURING COMPANY, a corporation,
Appellee.

No. 2167

Upon Appeal from the United States District Court for the Eastern District of Washington Northern Division.

APPELLANT'S OPENING BRIEF.

DANSON, WILLIAMS & DANSON,
Counsel for Appellant.

Spokane, Washington.

Quick Print Press Spokane, Wash.

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Upon Appeal from the United States District Court for the Eastern District of Washington Northern Division.

APPELLANT'S OPENING BRIEF.

Appellant, M. A. Phelps Lumber Company, a corporation, was defendant in the court below. The suit was brought by McDonough Manufacturing Company, a corporation, and a resident of Wisconsin, to foreclose a purported material-man's lien on certain real property in the State of Washington.

In paragraph 8 of the amended bill of complaint (Transcript 2), it is alleged that the entire amount which became due appellee, was $22,498.97; that payments had been made in cash, notes, and by payment

of freight aggregating $16,616.34, leaving unpaid $5,882.63; the prayer for relief is for money judgment against appellant for said sum of $5,882.63, with interest, $750.00 attorneys' fees, and for the foreclosure of the lien and the sale of the property in satisfaction of the amounts found due. Attached to and made a part of the said amended bill is a copy of the lien notice (Transcript 16), where the same facts, with reference to the amount which became due, the amount of payment, and the amount remaining unpaid, are recited, and the lien is claimed for the said sum of $5,882.63.

It is further alleged in the amended bill, that the materials for which the lien is claimed, were furnished under a written contract of date September 15, 1910, which contract was modified in writing, on October 12, 1910 (Transcript 3 and 4) and the writings are attached and made a part of the amended bill (Transcript 9, 10 and 11). In the contract of September 15, 1910 (Ex. A; Transcript 9 and 10), there appears the following provision: "It is agreed that title to the property mentioned above, shall remain in the consignor, until fully paid for in cash."

The materials contracted to be furnished, and which were furnished, and for which a lien is claimed, were certain sawmill machinery and equipment. The only allegation in the amended bill on which any right of lien is asserted, is paragraph 9 thereof (Transcript 7), as follows:

"That all of said machinery and material was sold and delivered to defendant for the use in the erection

of a sawmill upon that certain real property above described, and was by defendant used in the erection of said sawmill upon said premises, and that all of said above described land is necessary for the convenient use and occupation of said sawmill."

This allegation in the amended bill, was admitted and the proof introduced is not broader than this allegation. To this amended bill appellant demurred, for want of equity, and for failure to state facts sufficient to entitle appellee to any of the relief demanded (Transcript 19). This demurrer was overruled (Transcript 21).

In due course, after the overruling of the demurrer to the amended bill, appellant answered denying certain portions of the amended bill and by cross-complaint setting up a breach of the contract by appellee, in failing to deliver the material within the time provided by the contract, and defects in certain of the machinery, and further alleging that certain of the materials contracted for were never delivered, and for the damages suffered, and an affirmative judgment was prayer for (Transcript 23).

A decree was entered by the lower court, on April 25, 1912, foreclosing the purported lien, awarding judgment in favor of appellee for $6,997.34, $500.00 attorney's fees, and costs of suit, and ordering the real estate, described in the purported lien sold for the payment thereof (Transcript 363). The opinion of the court on which the decree was entered, however, was filed April 20, 1912 (Transcript 360), and from this it will be noted that itmes for which the lien was filed, aggregating $968.67, were disallowed by the court, and

that in fact there was included in the decree $1,601.25, not claimed in the pleadings nor the lien. There was never any attempt in any way to amend the Amended Bill or the Lien Notice, except that the lower court, at the time of signing the decree, signed an order permitting appellee to amend the bil, and the lien notice, by increasing the amount claimed (Transcript 373). This order was made in the absence of counsel for appellant, and without notice to them, and without any application being made therefore, or without consent being given. While the order purports to be dated April 15, 1912, and to have been filed on the same date, in fact, it was signed on April 25, 1912, the date on which the decree was signed, and filed at the same time. This is admitted by all parties concerned, as shown by the affidavits made on the motion of appellant to vacate this order (Transcript 375 and 378). The period within which a lien can be filed, under the statutes of the State of Washington, is ninety days from the date of the last delivery, and an action for foreclosure must be brought within eight months thereafter. The last delivery of materials claimed was May 24, 1911, and more than eleven months had expired at the time the court attempted to make this order. The order was not made for the purpose of conforming to the evidence introduced, since there was no evidence on the subject.

ASSIGNMENTS OF ERROR.

The Honorable District Judge erred in the following particulars, to-wit:

FIRST. Because under the allegations of the bill of

complaint, and under the evidence, a right of lien did not exist for any of the amounts claimed in the bill.

SECOND. Because if a right of lien existed for any of the amounts claimed in the bill, the amount awarded in the decree was much greater than the amount proved, for which a lien existed.

THIRD. Because the court had no jurisdiction or authority to award attorney's fee as allowed in the decree, no right of lien existing.

FOURTH. Because in the claim of lien on which the action was based, but $5882.63 was claimed, and by the decreet the court has sought to enforce a lien for much more than claimed.

FIFTH. Because no authority existed for the entry of judgment in any amount greater than that for which the lien could be enforced, and the lien was not enforcible in any amount.

SIXTH. Because the court failed to pass on or allow any portion of the counter claim or cross-complaint of the defendant, and under the evidence such counter claim and cross complaint were established.

SEVENTH. Because the court, at or after the time of the signing of the decree, without notice to defendant, and without any motion therefor, made an order purporting to amend the complaint and amend the lien notice, and caused such order to be filed as of date April 15, 1912.

EIGHTH. Because the court made an order allow-

ing the lien notice to be amended increasing the amount claimed.

WHEREFORE, appellant prays that the judgment and decree of the Honorable District Court be reversed and this cause ordered dismissed, and for such other relief as the court shall find appellant to be entitled.

ARGUMENT.

Appellant's contentions, briefly summarized, are as follows:

That the decree of the District Court was erroneous for the reason that appellee neither alleged nor produced evidence showing that it was entitled to a lien; that even if it should be held that appellee alleged and proved a right of lien, the decree of the court allowed a lien for an amount in excess of that to which appellee was entitled; that no portion of the counter-claim or cross-complaint was allowed, although established by the evidence.

Appelle was not entitled to a lien on appellant's realty for the sawmill machinery, fittings and supplies alleged to have been furnished appellant, for the reason that there was a failure to allege or prove that the property, the furnishing of which is claimed as a basis for a lien, became a part of the realty, which was essential to support a claim of lien. The property itself was personalty and could only become a part of the realty by actual annexation to the realty with the intention of making it a permanent accession to the freehold. There was no evidence to show that it was so annexed, and the agreement pursuant to which the chattels were

furnished, conclusively establishes that it was not, by providing that title to the property should remain in the appellee until fully paid for in cash.

The decree allowed a lien in excess of that to which appellee was entitled (assuming that it was entitled to one) under its claim of lien on which the suit was based.

APPELLEE WAS NOT ENTITLED TO A LIEN.

(This division of the Argument relates to Assignments of Error 1, 2, 3 and 5.)

1. THERE WAS NO EVIDENCE SHOWING THAT THE PROPERTY FURNISHED EVER BECAME A PART OF THE REALTY.

The statute of the State of Washington, giving a right to a lien, reads as follows:

"Every person performing labor upon, or furnishing material to be used in the construction, alteration, or repair of any mining claim, building, wharf, bridge, ditch, dike, flume, tunnel, well, fence, machinery, railroad, street railway, wagon road, aqueduct to create hydraulic power, or any other structure * * * has a lien upon the same for the * * * material furnished * * *."

> *Remington & Ballinger's Annotated Codes & Statutes of Washington,* Sec. 1129.

The purpose of this provision is to give the materialman a purchase price lien on the thing itself. When it has lost its identity by becoming merged into something else, then, and in that case only, does the statute give a lien on the thing into which it has become incorporated.

"Doubtless, the actuating thought of the legislature was that the material-man should retain a purchase price lien upon the thing itself; and this could be accomplished only by allowing a lien upon the building and premises into which, or upon which, said material should become builded or delivered."

Fuller & Co. vs. Ryan, 44 Wash. 385. 7; 87 Pac. 485, 6.

See also:

27 *Cyc.* 31.

The appellee alleged, among other things, that it furnished appellant the following chattels for which a lien is claimed: Boilers, steam drums, pumps for boilers, refuse conveyor, shafts, pulleys, boxes, tail and return idlers, set collars, chains, cast steel dogs, engines, nigger bars, steel cleats, saws, attachments, etc. (Transcript, 12-16).

Whether or not these chattels are within the Washington lien laws depends upon whether they became fixtures or a part of the realty.

American Radiator Co. vs. Pendleton, 62 Wash. 56, 7; 112 Pac. 1117;
Gasoway vs. Thomas, 56 Wash. 77, 9; 105 Pac. 168;
27 *Cyc.* 38.

Whether they become a part of the realty depends upon whether they were actually annexed to the realty with the intention of the parties making the annexation that they should become a permanent accession to the freehold.

"The true criterion of a fixture is the united application of these requisites: (1) Actual annexation to the realty, or something appertaining thereto; (2) application to the use or purpose to which that part of the realty to which it is connected is appropriated; and (3) the intention of the party making the annexation to make a permanent accession to the freehold."

American Radiator Co. vs. Pendleton, 62 Wash. 56, 7 and 8; 112 Pac. 1117;
Gasaway vs. Thomas, 56 Wash. 77, 9; 105 Pac. 168;
Filley vs. Christopher, 39 Wash. 22, 5; 80 Pac. 834.

Of course, the burden was upon appellee to allege and prove that the chattels lost their character as such by being merged into the realty.

"An evident corollary of the modern rule thus established is that the burden of showing the existence of these requisites for merger, including the intention, is upon the party claiming the chattel to have become merged in the realty. * * *

"As to the intention, of course, it is not the unrevealed secret intention that controls. It is the intention indicated by the proven facts and circumstances, including the relation, the conduct and the language of the parties—the intention that should be inferred from all these."

Hayford vs. Wentworth (Me.), 54 Atl. 940, 1.

"It is plain that without some other facts, a court cannot say as a matter of law that 'one steam boiler, on steam engine, one still complete, one doubler, one worm and worm tub, and one large tank,' are fixtures *per se.* Nor is the court competent to draw from the evidence, however clear and uncontradicted it may be, an inference of the facts necessary to make them so."

Campbell vs. O'Neil, 64 Pa. St. 290, 2.

"The only evidence of actual annexation to the realty besides their presence in the buildings, is the fact that the machines were fastened in place by lag screws. This is a screw with a nut head which may readily be turned by a wrench. This adjustable fastening held them to the floors, so that when in use they might not be jarred out of position by the motion of communicated power. One, even of the heavier and larger ones, were annexed in another permanent way to the buildings or real estate. There is no evidence which indicates any intention that these machines, should become either temporarily or permanently a part of the freehold. * * * To determine that there has been a conversion, there must be evidence which shows an annexation of a character to indicate that there is a purpose to make the chattel a part of the realty.

"The proofs in this case do show one of the elements necessary to support a conversion of chattels into realty. The machines were used for the same purpose to which the realty was appropriated. But this is not enough. All of the essential incidents must co-exist in order to effect a conversion. In this case there is no sufficient showing, either of an actual annexation of the machines, or of an intention to make them part of the freehold. * * *"

Knickerbocker Trust Co. vs. Penn. Cordage Co. (N. J.), 50 Atl. 459, 65 and 66.

"Whether this machinery had been annexed to the realty, and by the annexation a permanent accession to the freehold was intended, is not shown by the evidence. Courts cannot know otherwise than through the medium of evidence the particular facts necessary to convert this character of property, primarily personal, into fixtures, or parts of the realty in connection with which it may be used. The burden of proving such facts, if from them they could derive benefit, rested upon the complainants. As the case is now presented by the

evidence, the machinery must be deemed the personal property of the corporation in determining the character of the transfers to the appellants.''

Bank of Opelika vs. Kizer (Ala.), 24 So. 11, 14.

See also:

Haas Etc. Co. vs. Springfield Etc. Co. (Ill.), 86 N. E. 248, 52 and 53;
Johnson vs. Moser (Ia.), 47 N. W. 996;
Parker vs. Blount Co. (Ala.), 41 So. 923;
5 *Encyc. of Evi.* 757.

There is no evidence in the record from which it could have been determined by the court that any of the machinery or supplies had been annexed to the realty, much less that there was an intention that the whole or any part was intended to become permanently attached. The evidence goes no further than to show that certain chattels were furnished appellant to be used in a sawmill. Evidence showing whether or not they were annexed to the realty, the manner of attachment, if attached, and the intention to permanently attach, is wholly wanting.

Many of the chattels upon which the claim of lien is based, probably could not have become the subject-matter of such a claim in any event.

''This machinery consisted of a portable fire-box boiler, engines, lathes, shaft, pulleys, belt pipes, saws, carriages, conveyors, pumps, edgers, plainers, exhaust fans boring machines, emery wheels, dry kiln apparatus and other machines, tools and appliances. Nearly all of these things were in various ways attached to the floors, ceilings or posts of the buildings; but were only so attached; but none were so attached but that they

could be removed and taken from the buildings without injury to the buildings. It seems to use quite clear from the evidence that none of these machines and appliances were specially made for these buildings or for this plant. They were all known as standard or stock good, and sold as such by catalogue or price lists by the manufacturer, and were suitable for use in any plant of this nature. It is true dry kiln apparatus appears to be made up of different parts put together in the building, and in that sense it might be said to have been made for the plant; but the evidence tends to show that such parts were like the other machines and appliances, stock goods. Under prior decisions of this court, we think it follows that these machines and appliances are not fixtures, but personal property, and hence not subject to the mortgage."

Zimmerman vs. Bosse, 60 Wash. 556, 7 and 8; 111 Pac. 796.

See also:

Neufelder vs. Third St. Etc. Railway, 23 Wash. 470; 63 Pac. 197.

Where lienable and non-lienable items are included in a claim of lien, and there is no evidence showing which are lienable, the claim of lien as a whole fails.

"It may be conceded that where some single, non-lienable item, or even several are mistakenly included in a claim of lien, and such items can be readily segregated from those which are lienable, that such fact will not necessarily destroy claimants right of lien; but when the commingling occurs in such matter that the court is unable to determine with certainty what are and what are not lienable items in the claim made, then the rule seems to be that the entire claim of lien is of no effect."

Gilbert Hunt Co. vs. Parry, 59 Wash. 646, 50; 110 Pac. 541.

2. CONTRACT DISCLOSES INTENTION THAT THE CHATTELS SHOULD NOT BECOME MERGED IN REALTY.

The contract provides that "title to the property mentioned above shall remain in the consignor until full paid for in cash." (Transcript 10.)

Not only is such a provision evidence of an intention that the chattels should not become a part of the realty, but as between the parties it is held to be conclusive evidence of such intention.

"And the stipulation of the vendor in each of these cases, that the title to the property furnished by it, should not pass until it had been paid for by the purchaser, precludes the idea that either of them intended that the machinery furnished by it should become a part of the realty until payment had been made; as to impute a different intention would be to suppose that neither intended the benefit of a stipulation exacted with the greatest care in its own behalf. In such case the intention of the purchaser must be regarded as subordinate to the prior intention of the vendor, expressed in the agreement by which he has possession of the property."

Case Manuf'g. Co. vs. Garver (O.), 13 N. E. 493, 7.

"The case is ruled by Adams vs. Lee, 31 Mich. 440, and Robertson vs. Corset, 39 Mich. 777. In Adams vs. Lee the court said: 'All the time therefore, the parties have had title to the machinery distinct from their title to the land, and this fact of itself is conclusive that the former was personalty, for to constitute a fixture there must not only be physical annexation in some form to

the realty, but there must be unity of title, so that a conveyance of the realty would of necessity convey the fixtures also. When the ownership of the land is in one person and of the thing affixed to it is in another, and in its nature is capable of severance without injury to the former, the latter cannot in contemplation of law, become a part of the former, but must necessarily remain distinct property to be used and dealt with as personal property to be used and dealt with as personal estate only."

Lansing Iron & Engine W'ks. vs. Walker (Mich.), 51 N. W. 1061, 2.

"There could be no clearer expression of an intention than an agreement that the property should remain the property of the vendor, although placed in possession of the proposed purchaser."

Harris vs. Hackley (Mich.), 86 N. W. 389, 90.

"So, if one agrees to sell to another personal property and deliver it, retaining the title until the purchase money be paid, and vendee obtain his consent and move it upon and attach it to the vendee's realty, it will, in our opinion, remain personalty as between the parties to that transaction."

Harke vs. Cain (Tex.), 6 S. W. 637, 9.

"It is impossible, under the evidence, to charge the owner with having consented that the chattels should become a part of the free hold. The contract itself, which contains not only a reservation of the title, but also a right to remove them from the premises, forbids the idea of such consent."

General Electric Co. vs. Transit Equipment Co. (N. J.), 42 Atl. 101, 5.

"An intent existing alone in the mind of him who

makes the annexation differs from another feature which is recognized in the case as preserving the personal character of the property annexed. That feature consists in the existence of a mutual agreement, expressed or implied, between the owner of the real estate and the chattels in respect to the manner in which chattels shall be regarded after their annexation. Such an agreement seems to be entirely efficacious in preserving the personal character of the annexed chattels as between the parties thereto."

Campbell vs. Roddy (N. J.), 14 Atl. 279, 81.

"Appellant retained title and remained owner of the property until fully paid for * * *. The agreement of the parties shows that the property, as between them, was to remain personalty, though annexed to the free hold."

John Van Range Co. vs. Allen (Miss.), 7 So. 499.

The rule was not stated but was applied in Cherry vs. Arthur, 5 Wash. 787, 8; 32 Pac. 744.

In Washington National Bank vs. Smith, 15 Wash. 160, 69 and 70; 45 Pac. 736, a chattel mortgage given by the purchaser was held to have the same effect as retaining title in the vendor had in the above cases. The court said:

"* * * but it was made to appear by uncontradicted testimony, that at the time he put the machinery in the building he made a chattel mortgage thereon, and it must follow that either he supposed at the time that it was not so affixed to the real estate as to become a part thereof, or else he intended to deceive the party to whom he executed such chattel mortgage, and it is more reasonable to presume that he acted honestly in the making of such mortgage, than that he thereby intended to perpetrate a fraud. If the question as to the

nature of this property had arisen between the mortgagee named in said chattel mortgage and the appellant, there could be no doubt, but that under the rule heretofore announced by this court it would be held to be personal property, and in our opinion the rule was not changed by the fact that the question was raised between the parties to the real estate mortgage.''

In Holly Manuf'g. Co. vs. New Chester Water Co., 48 Fed. 879, 87, the court said:

''The Holly Company's right to 'remain in and have full possession' of the engines plainly was inconsistent with such a conversion.''

The decision was affirmed in 53 Fed. 19.

There are many other cases to the same effect.

See:

19 *Cyc.* 1048;
Smith vs. Bay St. Sav. Bank (Mass.), 88 N. E. 1086, 8;
Buzzell vs. Cummings (Va.), 18 Atl. 93, 4;
Hawkins vs. Hersey (Me.), 30 Atl. 14, 15;
Lansing Etc. Wks. vs. Wilbur (Mich.), 69 N. W. 667, 8;
Warren vs. Liddell (Ala.), 20 So. 89, 92;
N. W. Mutual Life Ins. Co. vs. George (Minn.), 79 N. W. 1028.

ALLEGATIONS IN BILL INSUFFICIENT TO SUPPORT DECREE ESTABLISHING LIEN.

There is an allegation that the machinery ''was sold and delivered to defendant for the use in the erection of a *sawmill,* * * * and was by said defendant used in the erection of said *sawmill* upon said premises'' (Transcript 7).

The allegation that the machinery was "used in the erection of a sawmill" is not the equivalent of an allegation that it became a fixture and a part of the realty. And such an allegation is not to be found in the pleadings.

A sawmill is defined in Webster's International Dictionary as "a mill for sawing; especially one for sawing timber or lumber."

In the same work a *mill* is thus defined:

"A common name for various machines which produce a manufactured product or change the form of raw material by the continuous repetition of some simple action; as, a sawmill, a stamping mill, etc."

The phrase "erection of a sawmill" does not of itself then amount to an allegation that that which was erected became a part of the realty any more than an allegation that parts of any machine were assembled on a certain tract would impart that the machine became a part of the realty.

There is nothing in the pleadings to indicate that the machinery or supplies entered into the construction of a building or other structure which would presumably be permanently annexed to the realty.

The pleadings indicate that the term "sawmill" was used only in referring to machinery or a group of machines used for sawing timber. In the absence of an allegation that such machinery was so annexed as to become incorporated into the realty and had thus lost its character as chattels, the pleadings did not state facts which entitled appellee to a lien.

The contract conclusively shows that the machinery and supplies never became incorporated into the realty so as to no longer retain the character of chattels. This has been made clear above. The contract is a part of the bill of complaint (Transcript 9 and 10) and the allegations in the bill will be interpreted so as to be consistent therewith.

> *Willard vs. Davis*, 122 Fed. 363;
> *City of Nauvoo vs. Ritter*, 97 U. S. 389; 24 Law Ed. 1050;
> 31 *Cyc.* 561, 563 and 564;
> *Richardson vs. Ebert* (W. Va.), 56 S. E. 887;
> *Board of Education vs. Berry* (W. Va.), 59 S. E. 169;
> *Loar vs. Wilfrog* (W. Va.), 61 S. E. 333;
> *Lea vs. Robeson*, 12 Gray (Mass.) 280;
> *Dillon vs. Barnard*, 21 Wall. 430; 22 L. Ed. 673;
> *Land Co. vs. Maxwell Land Co.*, 139 U. S. 569; 35 L. Ed. 278.

Appellant submits that sufficient facts were neither alleged nor proven to entitle appellee to a lien.

Of course, the right to an attorney's fee depended upon the right to a lien, and since the right to a lien did not exist the attorney's fee was not properly allowed.

AN EXCESSIVE AMOUNT WAS ALLOWED IN THE DECREE.

Assignments of Error 4, 7 and 8 are discussed under this division.

The claim of lien was for $5,882.63 (Transcript 18 and 389). The court rendered an opinion April 20, allowing a lien for $4,865.55 of this amount (Transcript 362). Subsequent to that time, and on the day the de-

cree was signed, the court, without notice to appellant, made an order purporting to authorize the amending of the bill and the lien notice, and caused the same to be filed as of date April 15, 1912. This order was made more than eleven months after the last machinery or material was delivered. It provided that the bill of complaint and "the lien of said plaintiffs be amended," so as to constitute a claim of lien for $7,483.98 instead of $5,882.63 (Transcript 373 and 374).

The order allowing amendment was made under extraordinary circumstances. There was no application by appellee requesting such an order by the court, and it likewise fails to disclose a compliance with the order made. It was entered without notice to appellant on the same day the decree was entered, and it was dated back to the time of trial (Transcript 375-383).

Passing by the effect of such irregular proceedings, the right of the court to enter such an order in any event comes into question.

The only theory upon which a court will allow an amendment of a pleading after trial of the issues is that evidence has been adduced by one of the parties without objection, showing the complainant entitled to additional relief. In other words, after trial the court will only allow an amendment for the purpose of making the pleadings conform to the evidence. The only relief which a court can grant is that to which the pleadings or the evidence entitles the party. That is too well settled to be controverted.

The appellant submits that the record discloses absolutely no evidence relating in any manner to the

$1,601.25 which was allowed as a lien in addition to that claimed in the bill of complaint and lien notice. The record discloses no evidence that appellee furnished machinery or supplies for which it received no compensation other than that disclosed in the original bill of complaint and the claim of lien notice.

The theory upon which the District Court ordered the amendment is disclosed in the following language found in the order.

"And it appearing to the satisfaction of the court that the demand in the original complaint was framed upon a basis of an offer and tender to defendant of a credit and offset of One Thousand Six Hundred One and 25-100 Dollars ($1,601.25).

"And it appearing further that said defendant refused to accept said tender credit as an offset on the contract in course of action described in said amended complaint, and that said defendant in open court elected and chose to take and receive said credits or such other, lesser or greater sum of credit to which it might appear that said defendant became entitled in the premises as and for an offset against other obligations due from defendant to complainant, to-wit, as an offset upon the promissory note above referred to and to the payment of which said note said defendant was authorized and permitted and asserted said credit as aforesaid." (Transcript 374.)

But the record does not disclose a tender by appellee in any amount nor an election to offset any credits against any other obligations. The order was clearly entered by reason of misconception of the state of the evidence.

No credit was at any time given by appellee for any supplies or material not furnished. The only credit

given is that allowed in paragraph 8 of the complaint, where it is said "that said defendant has paid in money and by way of payment of freight" the sum of $12,116.10, and that appellant had made a further payment of $4,500.24 by executing and delivering to appellee certain notes for that sum. That it is not conceded in the pleadings that appellee did fail to furnish any of the materials contracted for is shown by the fact that it is alleged in this same paragraph that there became due it for the performance of the contract and for the extra materials furnished, as shown by exhibits attached to the answer, $22,498.97. Of this $4,032.97 represents the extras claimed in Exhibit "C" attached to the complaint, and $18,466.00, the contract price, less allowance of $284.00 for elimination of hog. Par. 5 of bill represents the full performance of the contract less the hog. The court disallowed $768.67 of the extras claimed, which reduces the amount of materials furnished to $21,730.30. Appellant claimed that other materials, as shown by exhibits attached to the answer (Transcript 42-55), were not furnished, aggregating in value $1,946.08. Appellee conceded on the trial that certain of these materials were not furnished, but fixed the value thereof, exclusive of freight from Spokane to Cusick, at about $1,343.00 (Transcript 268-269). Therefore, by appellee's concessions on the trial, the entire value of all materials furnished did not exceed $20,-387.30, while, according to appellant's testimony, it did not exceed $19,784.22, conceding the extras for the amount allowed by the court. The amount paid by appellant, as alleged in paragraph 8 of the complaint and as conceded in the answer, by cash, payment of freight and notes was $16,616.34, leaving the amount

due appellee, making no allowance for damages suffered, the sum of $3,770.96, according to appellee's evidence, and the sum of $3,167.88, according to appellant's evidence.

That the amount claimed by appellant for this material which it was compelled to purchase should be allowed in its entirety we believe the record clearly shows. As appears above, the amount claimed for these items was $1,946.08. It was through no fault of appellant that it was compelled to purchase these goods which were included in the contract with appellee. Appellee refused to furnish them and long after the time had elapsed for the entire contract to be completed, appellee gave its consent for appellant to purchase same (Transcript 446). Appellant purchased these materials to the best advantages, paying cash in order to obtain a discount (Transcript 195 and 196), and shipped same to Cusick. In addition to the cash paid by appellant in purchasing these goods, it was put to considerable expense and trouble in obtaining same. The amount paid by appellant is not disputed. The only attempt to question same is the testimony of Mr. Hubbard and another of his witnesses that, in their opinion, the bill should not have been so large (Transcript 268 and 272). Where appellant, through the default of appellee was compelled to purchase these goods, it does not seem that any doubt should be resolved in appellee's favor. The burden was on appellee to prove that it furnished the materials called for by the contract. It is now conceded that it did not furnish all of them.

On addition to the above conceded items of materials which were not furnished, the record discloses, without

contradiction, that certain of the piping whch was furnished by appellee had not been cut nor threaded, and appellant was compelled to expend $175.00 in remedying this defect (Transcript 159). The band wheel was defective (Transcript 120), and the necessary expense incurred in having same put in proper condition was $175.00 (Transcript 85). The contract provided that the boxes were to be planed on both sides, but it appears (Transcript 85) that very few of them were according to the contract, and appellant sustained a damage of $100.00 on account of this item; that appellant paid $60.00 on account of these materials to Mr. McIntyre, the local representative of appellee, and no credit was given for this item (Transcript 196). None of these items were disputed in the evidence and the amount thereof, $510.00, should have been allowed by the court, reducing the amount for which a judgment could have been entered, according to appellee's figures, to $3,260.96, and according to appellant's figures, to $2,657.88.

Notwithstanding the above credits, which were not disputed, the court in some method has arrived at the conclusion that there was $6,997.34 due appellee, together with attorney's fee and costs.

Under the contract, appellee was bound by the agreement to furnish "all necessary valves and piping necessary in connecting up all water and steam appliances of every kind, furnished by McDonough Manufacturing Company, including all exhaust, whistle and blow-off pipes, also all necessary valves of approved make, including necessary valves and pipe for disconnecting one boiler from the other so that either boiler can be used

independent from the other * * * and any member of the machinery to complete the mill found lacking * * * also to furnish all bolts and washers necessary to properly install said mill, including tighteners, also all iron necessary to be used in connection with the conveyer and transfer system, also all iron for log slip, log deck and sorting table." (See page 39, Exhibit 20.)

Instead, therefore, of the record sustaining a claim that appellee brought suit for $1,601.25 less than it had a right to claim, or filed its lien for any such less sum, it appears conclusively that it filed its lien and brought its suit for between $2,521.67 and $3,224.75 more than it had a right to claim, and this without giving any consideration to the materials which should have been furnished by appellee and were not, and which appellant did not itself supply, and without giving any consideration to the damages to which appellant showed it was entitled by reason of the breach of contract. The failure of appellee to furnish certain materials, consisting of those which appellant afterward purchased, together with those which it did not purchase. and which were included in the contract price of $18,750, is alleged in the answer (Transcript 36), and by replication appellee denies that it failed to furnish any of these materials or that appellant was entitled to any credit by reason of any such failure (Transcript 56).

The record is silent as to any evidence in support of this claim of appellant that $1,601.25 was omitted from the complaint. The only evidence introduced by appellee which would have any bearing on the amount of its claim was the lien notice (Transcript 334, 388) While this lien notice was not evidence in favor of

appellee, yet it was an admission by appellee of which appellant could take advantage. This lien claim alleges that the amount due was $5,882.63 after allowing the same credits referred to in the complaint.

In the above estimate of what the evidence shows as to the amount unpaid, nothing has been said concerning "also all iron necessary to be used in connection with the conveyer and transfer system, also *all iron* for log slip, log deck and sorting table." Nor has anything been said as to the damages suffered by appellant through the breach of the contract by appellee. On both of these questions there was a controversy as to some portions thereof. No credit was allowed by the court for any of these items.

With reference to the iron for conveyer system and log slip, appellant's evidence showed that it would cost to obtain same about $343.48 (Transcript 160).

There can scarcely be said to be a dispute in the evidence as to the amount of damages suffered by appellant by reason of the failure of appellee to deliver the materials in time. This evidence shows that four million feet of logs in which appellant had invested about $25,000.00 had to be carried over until the next season, resulting in an interest loss of $600 (Transcript 74 and 82), and more than $2,500 by reason of depreciation and deterioration of the saw logs which had to be carried over (Transcript 76 and 119), and $3,850 rental value of the mill between the date it would have been in operation if furnished within the time stipulated and the date when appellant was able to start the mill (Transcript 74, 84 and 155), making a total of more than

$6,950. It was not attempted by appellee to dispute that these damages had actually been suffered. In addition there were other items which we will not burden the court with mentioning since it would unduly extend this brief. That this loss was occasioned by the fault of appellee we think a reading of the record will clearly show. We will not endeavor to analyze the evidence since the court will, no doubt, read the entire record and an attempt to analyze same would be more liable to lead to confusion than to elucidation. We will, however, mention several important points.

By the contract, shipments were to begin on Feb. 15, 1911, and to be completed about March 15, 1911 (Transcript 11). It was not, therefore, necessary in order for appellant to complain, that it should have given appellee directions to ship at any earlier date than Feb. 15th. Notwithstanding this, appellant, as early as Dec. 1, 1910, notified appellee that it might commence shipping at once (Transcript 406). On Jan. 10, appellant urged haste in shipping machinery and appellee promised to rush the shipments (Transcript 410, 411). An examination of the transcript will show that from this time on appellant was continually urging shipment and appellee was making promises. On Dec. 5, 1910, appellee spoke encouragingly of being able to furnish the machinery very soon and advised that it would be able to ship the engine on the second car (Transcript 407). Notwithstanding this assurance, on March 18, 1911, appellee was still unprepared to ship the engine (Transcript 473). On April 6, 1911, appellee again writes that the engine is not ready to go forward but that "boilers go forward 5th inst. Engine, saws,

pump, chain, ten days to two weeks" (Transcript 476). In fact, the engine was not shipped until April 20th (Transcript 255 and 256). It seems to us that nothing more is necessary to show the unwarranted delay on the part of appellee than the above; in fact, that there was not an attempt to fairly perform the contract, and that it did not concern itself greatly in attempting to save appellant from damage. After the boilers had been received at Cusick on May 24, 1911, there was yet a delay of 10 to 12 days occasioned by the failure of appellee to have its erectors on the ground to perform its contract to put the boilers in place. From the date of the contract as finally consummated, to the date these materials were finally shipped was about seven months, yet Mr. Hubbard, the President of appellee, states that ninety days would have been a reasonable time within which to perform the contract (Transcript 254).

By the decree a lien was allowed for $1,601.25 and interest more than the court could have allowed as a lien under the original claim even though the evidence and pleadings showed a mistake in the amount (Transcript 362, 363 and 364). The statutes of the State of Washington provide that a claim of lien must be filed within ninety days from the date that the last materials were furnished in order to entitle a vendor to a lien.

"No lien created by this chapter shall exist and no action to enforce the same shall be maintained unless within ninety days from the date of cessation * * * of the furnishing of such materials, and claim for such lien shall be filed for record as hereinafter provided * * *."

> *Remington & Ballinger's Annotated Codes and Statutes of Washington*, Section 1134.

They also provide:

"No lien created by this chapter binds the property subject to the lien for a longer period than eight calendar months after the claim has been filed, unless an action be commenced in the proper court within that time to enforce such lien."

Sec. 1138, *Id.*

Appellant contends that an amendment enlarging the sum for which a lien is claimed, amounts to the filing of a new claim of lien for the additional sum and therefore cannot be made after the expiration of the statutory time for filing a lien.

This contention is made notwithstanding the Washington lien laws are "liberally construed with a view to effect their objects" and notwithstanding that it is provided in Section 1134 of the Statutes last above referred to that,

"Such claim of lien may be amended in case of action brought to foreclose the same, by order of the court, as pleadings may be, in so far as the interests of third persons shall not be affected by such amendment."

The Supreme Court of the State of Washington has allowed amendments, to correct an erroneous description of the property where the defendant pleaded the correct description, to include a leasehold interest in the claim of lien, which interest was described in the notice as an interest in the premises "the exact nature of which this claimant is ignorant," and, to add the place of residence of the notary before whom the lien was sworn.

Malfa vs. Crisp, 52 Wash. 509; 100 Pac. 1012;
Olson vs. Snake River Etc. Co., 22 Wash. 139, 44; 60 Pac. 156;
Stetson Etc. Co. vs. W. & J. Sloane Co., 61 Wash. 180; 112 Pac. 248;
Sullivan vs. Treen, 13 Wash. 261, 2; 43 Pac. 38.

But the courts have not gone to the length the District Court did in this case, and there is no authority for going to such a length. The legislature certainly did not intend that the amendment provision should give the court power to allow a lien without the claimant having asserted his claim within the ninety-day limitation. A claim of lien for one amount does not constitute a claim of lien for any other amount. The amended claim of lien in fact constituted another claim and was not filed in time. The right to amend does not give the right to substitute. When a new garment is substituted for an old it cannot be said that the old has been merely repaired. The words of the court in Fairchild vs. Dean. 15 Wis. 206, 10, are apt:

"To supply the defect requires creation, not amendment."

Appellant's contention is supported by the opinion found in J. B. Allfree Manufg. Co. vs. Henry (Wis.), 71 N. W. 370, 71 and 72. In that case a claim of lien was amended, after expiration of the period for filing a claim of lien, so as to make the lien run against the landlord's estate. He was referred to in the original claim of lien as having or claiming to have some lien upon the premises, but no claim of lien was made against his interest—the claim of lien was against a leasehold interest in the property owned by Henry. The court, in reversing the lower court, said:

"We do not think that any of the cases in this court cited and relied on by plaintiff's counsel support or justify the amendment of the claim for a lien allowed by the court. There was no allegation or hint in the claim, as filed, of an intent to assert a lien on the fee-simple interest of the defendant Henry, the landlord, upon the premises. It mentioned and referred only to the leasehold interest in the premises of J. H. Reysen & Son. It did not disclose who was the owner in fee. Four years afterwards, when the case had been tried before the referee upon the application for a judgment, the court directed the amendment of the claim for a lien, and the complaint as well, so as to assert a claim to a lien not only upon said leasehold interest of J. H. Reysen & Son, but upon the distinct and separate property and estate in fee of defendant Henry, who had not theretofore even been mentioned in said petition or claim, and judgment was given against his fee-simple estate accordingly. The time within which a lien or claim could be filed, if one could be filed against his estate under the statute, had expired. The action of the court was not the correction of a mistake, or misdescription, or failure to properly describe the interest of J. H. Reysen & Son, or of any one claiming under them. It was an entirely new proceeding, taken after the time limited for it by the statute had expired. The claim, as originally filed, as against Henry's fee-simple estate, was wholly inoperative, and a nullity. Knox vs. Hilty, 118 Pa. St. 430, 11 Atl. 792; Bartley v. Smith, 43 N. J. Law, 321. There was nothing to amend by, and the ruling of the Circuit Court carried the doctrine or amendment to an extent entirely unwarranted."

The Wisconsin statute allowing a claim of lien to be amended is worded just the same as the Washington statute. It is not quoted in the Allfree case but is set out in substance in Mark Paine Lumber Co. vs. Douglas County Imp. Co. (Wis.), 68 N. W. 1013, 14, as authorizing a claim of lien to be amended the same "as plead

ings" after the expiration of the statutory period for filing a claim of lien.

Harris vs. Page (R. I.), 50 Atl. 859, is in point. The court said:

"The petitioner moves for leave to amend the accounts filed in the recorder's office of the City of Providence, for the commencement of legal process to establish a lien on the real estate of the respondent for materials furnished in the erection of buildings thereon. As said in Murphy vs. Guisti, * * * 'The notice is to inform both the owner and the public of the nature and extent of the account or demand for which the lien is sought, and it must be exact enough for that.' It can not be exact enough to state the extent of the lien claimed, if the amount can be extended, or items added after the filing of the account s required by statute. In the case just cited it was held that the notice was not void because it claimed more than the petitioner was entitled to, but the purpose of the statute evidently precludes an allowance of the converse of the decision, that a petitioner may recover more than he has claimed according to the statute."

In Knox vs. Hilty (Pa.), 11 Atl. 792, 3, the lien was amended by striking out the name of the defendant as owner and inserting that of his wife as owner and co-defendant, after the statutory period for filing a lien had expired. The Appellate Court said:

"The words of that section are as follows: 'That in case of any mechanic's claim or lien, filed according to existing laws in any county of this commonwealth, the court having jurisdiction in such case is hereby authorized and required, in any stage of the proceedings, to permit amendments conducive to justice and a fair trial upon the merits, including the changing, adding and striking out the names of claimants, and by adding the

names of owners and contractors respectively, whenever it shall appear to said court that the names of the proper parties have been omitted, or that a mistake has been made in the names of such parties, or too many or not enough have been joined in such fault. There is nothing in this act which in the least degree gives sanction to the idea that the time for filing a lien may be extended beyond the six months by way of amendment, or that any person may be thus introduced against whom no right to file a lien existed when the amendment was made. If the legislature had any such purpose in view they certainly would have said so."

The rule is thus stated in Cyc.:

"Where a lien claim as filed is fatally defective or for some other reason the amendments sought would be in effect the filing of a new claim, it will not be allowed after the expiration of the time for filing and it has been held that after such time amendments to the claim introducing new parties cannot be made."

27 *Cyc.* 208.

An amendment of a pleading is not allowable if it introduces a new cause of action barred by the statute of limitations.

"According to the overwhelming weight of authority an amendment introducing a new and distinct cause of action barred by the statute of limitations is not allowable."

31 *Cyc.* 413.

This amendment amounted to the introduction into the bill of complaint of a new cause of action barred by the statute of limitations, and also amounted to the filing of a new claim of lien after the expiration of the period in which a lien could be claimed and therefore was not properly allowed.

We respectfully submit that the judgment of the Honorable District Court should be reversed and the action ordered dismissed, and that appellant be afforded such other relief to which it is entitled as shown herein.

Respectfully submitted,

DANSON, WILLIAMS & DANSON,

Attorneys for Appellant.

Spokane, Washington.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

M. A. PHELPS LUMBER COMPANY,
a corporation,

Appellant,

vs.

McDONOUGH MANUFACTURING COMPANY, a corporation,

Appellee.

No. 2167.

Upon Appeal from the United States District Court for the Eastern District of Washington Northern Division.

BRIEF OF APPELLEE.

McCARTHY & EDGE,

Counsel for Appellee

Spokane, Washington.

FILED
OCT 14 1912

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Spokane, Washington.

STATEMENT OF FACTS.

Appellant purchased from appellee certain machinery and material for use in the construction of a saw mill. This was to be shipped in carload lots from eastern states. The contract provided that upon the arrival of each car the value thereof was to be paid as a payment upon the contract as follows: "TERMS: Freight cash on receipt of B/L—One half invoice price of each car within five days from arrival of shipment; balance to be covered by notes * * *"—that is to say that appellant was to pay as a payment on the contract the amount of the freight charge, and was to pay one-half the invoice price of each car within five days after its arrival, and to execute its promissory note for the remaining half of the invoice price of the car.

In accordance with the terms of the contract appellant executed its promissory notes aggregating $4500.24, being for the first five car loads. It made payment in the two other modes designated—freight and cash—in the sum of $10,514.75.

The material sold was to consist in part of "necessary" iron for conveyors, etc. Appellee requested that appellant secure prices on this latter material in local markets in Spokane, and the negotiations resulted in appellant purchasing this material and charging same to appellee. Appellee consented to the material being

charged against it, placing, in its judgment, the reasonable maximum value thereof at $1601.25. It therefore credited the account of appellant with that sum also.

Adding this new credit to the amounts paid in addition to the notes, that is the freight and cash, to-wit: to the $10,514.75 it is found that (aside from the notes) the appellant became entitled to a credit of $12,016.00, practically the same (varying by only 10c) of the credit given by appellee to appellant in the lien notice and in the bill. Appellant did not show that by the two modes of payment—freight and cash—that it in fact ever paid more than $10,514.75. The credit shown in lien and bill can be gotten only by adding to this latter amount the said offered credit of $1601.25.

The lien involved in this suit was filed, and the suit commenced, for the account due from appellant to appellee above and in addition to the said promissory notes. After the commencement of this suit, and upon the maturity of the promissory notes, a separate action was commenced thereon. As a defense to that action appellant also set up as a counter claim the value of the material (necessary iron, etc.) above described, which it purchased, and charged to the account of the appellee. Upon this becoming apparent, and at the trial of this suit, appellee asked and was granted permission to amend its bill in such manner as to withdraw the said

tendered credit of $1601.25, and to increase the demand of its lien notice, and of its bill by said sum. Permission was granted by the court, but no formal order was at the time entered. Appellant made no objection at the trial to appellee making the above amendment of its pleadings.

After the trial, and when a form of decree was first presented to the trial court for signature, and in the presence of solicitor for appellant and for appellee, the trial judge suggested that a formal order reciting the amendment be prepared and submitted for his signature at the time of the signing of the final decree. Appellant's solicitor again made no objection. Appellee's solicitor, in accordance with this instruction, prepared such formal order and served copy upon solicitor for appellant. At the time the final decree was signed this formal order was also signed. The lien notice and bill as amended contained a total demand of $7483.98. Decree was finally entered for $6997.34 (exclusive of costs and attorney's fee), or for $486.64 less than the demand. Appellant also asserted its claim for necessary iron, etc., as an offset to the amount due on said promissory notes.

The property sold was built into and upon the realty in such manner as to become part thereof.

An unsigned instrument purporting to be an opinion

and filed several days prior to the signing and filing of the final decree is found in the transcript, but appellant does not contend but that the trial judge knowingly and intentionally finally entered the final decree for the amount therein recited, and the evidence was abundant to justify the entry of the decree for the amount therein recited.

All these facts will be sustained by appropriate reference to the transcript in the course of argument.

ARGUMENT.

In our Brief we shall discuss the alleged errors of which appellant makes complaint, under the three divisions by it adopted.

FIRST (1).

Appellant subdivides its first argument — that appellee was not entitled to a lien — into two parts, the first being that there was no evidence showing that the property furnished ever became a part of the realty. Our discussion of the second subdivision of this argument relating to the pleadings necessarily includes a discussion of the first. Suffice to say, however, that so far as concerns the evidence submitted that among the abundant testimony on this question may be noted that the material was designed and manufactured to fit a certain building,

which was also designed and constructed according to plans in such manner as to fit and receive the material (Transcript 9, 100, 404, 406, 462, 424, 426, 409, 451); that the material was bolted and fastened and built into the building (Transcript 171, 173, 176, 406); that the material in all was of great weight and mass, consisting of several carloads thereof, and that this in part consisted of three large stationary steam boilers; that these were constructed in conjunction with one another with breaching and connecting pipes, base, steam drum, etc., in such manner as to constitute one complete steam plant battery of boilers (Transcript 161, 432); that steam and water pipes connected this battery with remaining portions of material extending into different parts of the plant, and that these boilers were set permanently upon a masonry foundation with steel casings manufactured around them (Transcript 283); that same was connected by steam and water pipes with a stationary steam engine set upon a firm foundation (Transcript 281, 283), and placed in such manner as to be belted to and drive the entire plant, and that the plant as a whole was put in actual operation (Transcript 74, 142)—in fact that the whole constituted one large modern permanent plant for the manufacture of lumber, lath, planer mill products, etc., and which is so distinctively permanent in its nature as to cause wonder that its character should be questioned. The

whole transcript is so full of evidence, and in view of the pleadings and of the absence of evidence whatsoever offered to the contrary, it would seem that the claim of appellant that the material sold remained chattel property has occurred to it only during the course of appeal.

FIRST (2).

The second division of appellant's argument relating to this alleged error, is made under the head that the "Contract Discloses Intention that the Chattels should not become merged in the Realty." This is based solely upon the quotation from the original contract that

> "Title to the property mentioned above shall remain in the consignor until paid for in cash."

The appellant contents itself in its argument under this head with quotations from certain decisions, and by citing a few other decisions. If it could be said that any of these cases cited are in point they are far from the general rule.

The general rule is set out in Cyc. as follows:

> "The fact that one who furnishes materials for improvements on land retains the title to the materials until they are paid for does not deprive him of the right of a mechanics' lien."
> 27 *Cyc.* 276.

That equity considers the substance rather than the

form is one of the oldest and most elementary princi ples of equity. It has been invoked times innumerable, particularly in the common and usual instances of deeds absolute in form and of bills of sale, being both held to be mortgages where such instruments were made for purposes of security. That the insertion of this provision in the original contract was for purposes of security is so apparent as to preclude argument. Appellant does not contend, aside from this phrase, that appellee intended to design and manufacture machines of a particular construction, size and dimension, and to manufacture them in conjunction with one another, and in such manner as to fit the particular buildings being constructed by appellant and to permit them to be built into and upon the building and realty as above indicated, and to do all this with an intent that such material should remain chattels.

Indeed, if this contention were to be considered seriously it would, so far as this case is concerned, be set at rest by the paragraph in the bill, which was admitted by appellant by failing to answer same, which paragraph (Transcript 7) is as follows:

> "That all of said machinery and material was sold and delivered to defendant for use in the erection of a saw mill upon that certain real property above described, and was by said defendant used in the erection of said saw mill upon said

premises, and that all of said above described land is necessary for the convenient use and occupancy of said saw mill.''

When appellant admitted this paragraph it would seem that neither evidence nor authority would be required. But if citations are necessary the general rule set out above in Cyc. is sustained by abundant and eminent authority:

''The bill in this case seeks to have declared and enforced a mechanic's lien on and against certain mill property in Gallatin, Tenn., for the purpose of compelling payment for certain mill machinery and improvements made and placed upon said property by complainant under special contract with the defendants or the owners thereof. After setting out the contract under which the machinery was furnished and the improvements made, the bill states that complainant retained the title to the machinery until the same was fully paid for, and reserved the right, in the event defendants made default in payment, to take possession of and remove the same without legal process. * * *

''The material question raised by the first and second grounds of the demurrer is this: Did the retention of title to the machinery until the same was fully paid for, with the right reserved, in case of default in making payment on the part of defendants, to take possession and remove said machinery without legal process, operate as a waiver of the statutory lien given in such cases? The

statutory lien is given upon any lot of ground or tract of land upon which a house has been constructed, or fixtures or machinery have been furnished or erected, or improvements made by special contract with the owners of the premises, in favor of the mechanic, undertaker, founder, or machinist who does the work or furnishes the material, or puts thereon fixtures, machinery, or material of either wood or metal. Code, Tenn., Sec. 2739. The case made by the bill comes within the letter of the statute, and clearly confers upon complainant a lien upon the premises, so far as defendant's right, title and interest therein is concerned, which may be enforced in a court of equity, if the retention of title to the machinery until paid for does not have the effect and operation of waiving such statutory lien. The retention of title till payment was made for the machinery was in no way inconsistent with the statutory lien given upon the lot of ground or tract of land. The purpose of the stipulation was to secure the payment of the purchase money to be paid for the machinery. The retention of title was in the nature of a specific lien upon the identical machinery furnished. It was not inconsistent with the lien given by the statute upon the premises on which the machinery was placed or erected. Nor does it, as a matter of law, show any intention of waiving the latter lien. Retaining title as a means of securing payment on the part of defendants did not impose upon complainant any duty or obligation to assert such title by resuming possession of the machinery. Complainant could still look to defendants personally for the payment of the pur-

chase price of the machinery, and to any and all other remedies conferred by law to enforce its payment. Instead of being inconsistent, it was merely additional security to that provided by the statute. It certainly does not establish, as matter of law, that in thus retaining title to the machinery complainant has waived its statutory lien upon the lot of ground or premises on which the machinery was placed."

Case Mfg. Co. vs. Smith et al. (Circuit Court Tenn.), 40 Fed. Rep. 339, 340.

"This was an action for the enforcement of a mechanic's lien, removed by defendants from a state court. * * *

"The first insistence of the defendant Jacob Dold Packing Company is that the plaintiff waived its right to enforce a mechanic's lien herein by reason of the following provision in its contract with John Featherstone's Sons for furnishing the engine as subcontractor, to-wit:

'It is agreed that the engine' etc., 'above specified shall remain our property, as security for the deferred payments, until fully paid for in cash. There are no understandings or agreements outside of this written contract.'

It is true, as said by Judge Scott in Gorman v. Sagner, 22 Mo. 139, that:

'Although there may be some distinction between an equitable lien and one expressly given by law, yet there is nothing in the cases hostile to the idea

that the lien conferred by the statute may be extinguished by implication arising from the conduct of the parties.'

"Without indulging in any discursive discussion as to what state of facts might amount to such a waiver, as applied to a mechanic's lien, the court is of opinion that such reservation of title in the manufacturer or vendor does not amount to a waiver of the right to file and enforce a mechanic's lien for materials thus furnished. Manufacturing Co. v. Smith (C. C.), 40 Fed. 339, 5 L. R. A. 231; Chicago & A. R. Co. v. Union Rolling Mill Co., 109 U. S. 719, 3 Sup. Ct. 594, 27 L. Ed. 1981."

Hooven O. & R. Co. vs. Featherstone (Circuit Court Mo.), 99 Fed. Rep. 180, 181.

"This is a suit to foreclose a mechanic's lien upon defendant's mill and mines. * * *

"The particular section of the statute relied upon by the defendant provides that:

'Every original contractor, within sixty days after the completion of his contract, and every person, save the original contractor, * * * must,, within thirty days after the completion of any building, improvement, or structure, * * * file for record with the county recorder of the county in which the property, or some part thereof, is situated, a claim containing a statement of his demand, * * * with a statement of the terms, time given, and conditions of his contract. * * *' Cutting's Comp. Laws, Sec. 3885.

"2. The second contention of the defendant—that complainant waived its lien because it stipulated in the contract that the title to the machinery furnished by it should not pass from complainant until all payments therefor should be fully made in cash—is not, in my opinion, well taken. Hooven v. Featherstone's Sons, 111 Fed. 91, 95, 45 C. C. A. 229, and authorities there cited."

Salt Lake Hdw. Co. v. Chainman M. & E. Co. (Circuit Court Nev.), 128 Fed. 509, 510, 511.

In the above case the statute of Nevada is set out and it will be noted that so far as the question here raised is concerned, it is the same as the statute of Washington.

"Nor did the fact that in its contract for the sale of its engine the appellant secured from the contractor, Featherstone's Sons, the stipulation that 'the engine,' etc., 'shall remain our property as security for deferred payments until fully paid for in cash,' waive the lien upon the real estate of the respondent granted by the statute, or estop the Rentschler Company from enforcing it. This stipulation is not inconsistent with the grant of the statute. The former retained a lien upon the engine as security for the purchase price; the latter created a lien not only upon the engine, but upon the real estate of the respondent upon which it was placed. The former was alien by contract, the latter by statute; and neither is destructive of the other. The retention by contract of title to materials furnished as security for the purchase

price by the claimant of a mechanic's lien is not inconsistent with, and will not estop the vendor from enforcing, his statutory lien. Chicago A. & R. Co. v. Union Rolling Mill Co., 109 U. S. 702, 719, 3 Sup. Ct. 594, 27 L. Ed. 1081; Manufacturing Co. v. Smith (C. C.) 40 Fed. 339, 340, 5 L. E. A. 231; Clark v. Moore, 64 Ill. 279; Anthony v. Smith, 9 Humph. 508; Fogg v. Rogers, 2 Cold. 290."

Rooven, O. & R. Co. v. Featherstone (Circuit Court of Appeals, Eighth Circuit), 111 Fed. 81, at 95.

To the same effect are the decisions of the Supreme Court of the United States.

"We do not think that this stipulation shows any purpose on the part of the Rolling Mill Company to waive its statutory lien. When the contract was made, the railroad for which the mate rials were to be furnished was in contemplation only. The survey of its route had not been completed, nor had the right of way been obtained. The evident purpose of the stipulation was to secure a specific lien on the materials furnished, and to require them to be used in the construction of the railroad where they would be subject to the statutory lien, and the facts of this case show that this was a wise precaution. The contract, therefore, so far from showing a waiver of the statutory lien, shows a purpose on the part of the Rolling Mill Company to retain it. The statutory lien was, therefore, not lost. On this question the case of Clark v. Moore, 64 Ill. 279, is in point. In that case the Supreme Court of Illinois says:

'It is also insisted that appellees waived their rights when they sold the property, by reserving a lien upon it in a written contract; that they thereby received and held additional security that operated to destroy any lien that would otherwise have attached. It is true that where a laborer or material man receives security collateral to the property improved, whether the security be personal, or a mortgage on or a pledge of other property or chose in action, the law presumes that it was intended to waive or release the lien upon the premises. In their effort to retain a lien on the machinery furnished by appellees, they took no collateral or independent security. It was but a futile effort to retain a superior lien on the property furnished, over and above other lienholders. Had these parties taken a mortgage on these lots and the building which the law would have judged void, would anyone claim that they could not assert their lien? The lien attaches to and incumbers the property to improve which the material is furnished, and the effort to acquire a more specific and exclusive lien in nowise manifests intention to release the property from all liens and look to other security for payment; but it shows the very opposite intention, an intention to hold, if possible, the property liable for the payment of their claim.''

Chicago & Alton Ry. Co. v. Rolling Mill Co., 109 U. S. 669, 27 Law Ed. 1081, at 1088.

Among the decisions of the Supreme Court of different states which might be cited are the following:

"We think there can be no doubt that complainant could have and enforce its lien upon Hartman's entire actual interest in the premises, notwithstanding it retained the title to the objection to a creditor's having more than one security for the same debt. In the case of Manufacturing Co. v. Smith, decided in the United States Court of Tennessee, and reported in 40 Fed. 339, it was said: 'Instead of being inconsistent, it was merely additional, security to that provided by the statute. It certainly does not establish, as matter of law, that, in thus retaining title to the machinery, complainant has waived its statutory lien upon the lot of ground or premises on which the machinery was placed'."

Peninsular Gen. Elec. Co. v. Norris (Mich.), 59 N. W. 151, at 155.

Also

Henry & Coatsworth Co. v. Bond (Neb.), 55 N. W. 643.

Cooper v. Cleghorn (Wis.), 6 N. W. 491.

SECOND.

Appellant assigns as a second ground of error that the allegations in the bill are insufficient to support the decree establishing the lien.

Paragraph ten of the bill as stated above (Transcript 7) reads as follows:

> "That all of said machinery and material was sold and delivered to defendant for use in the erection of saw mill upon that certain property above described (being admitted correct description of realty as shown in paragraph two of bill), and was by said defendant used in the erection of said saw mill upon said premises, and that all of said above described land is necessary for the convenient use and occupancy of said mill."

This allegation was not denied.

A copy of the lien was attached to and made a part of the bill. This contains a recital (Transcript 17) that

> "* * * said material was to be used and all of which was used upon said premises in the erection thereon of a saw mill, and all of which said tract is necessary and convenient for the use of said building and improvement, and all of which land is in Pend O'Reille (formerly part of Stevens) County, Washington."

The statute of Washington providing for the contents of a lien contains the following:

> "* * * Such claim shall state, as nearly as may be, the time of the commencement and cessation of performing the labor, or furnishing the material, the name of the person who performed the labor, or furnished the material, the name of the person by whom the labor was employed (if known), or to whom the material was furnished, a description of the property to be charged with the

lien sufficient for the identification, the name of the owner, * * * etc."

R. & B. Codes & St. of Wn., Sec. 1134.

As will be noted, nothing is required under the Washington Statute, other than that the property be described sufficient for purposes of identification. It may well be doubted whether under the Washington Statute, any description whatsoever is required of the *building*. The statute contains the term "*a description of the property.*" In deeds and other instruments affecting realty a description of the *property* would be complete by a description of the land. The Washington statute says nothing whatever requiring a statement of a description of a *building* or *improvement*.

The general rule with reference to pleadings under the statutes is as follows:

> "Claimant's pleading should describe the premises which he seeks to subject to his lien. And while it is said that a building or improvement for which the material was furnished should be described also, a complaint is not bad which does not state the nature of the alterations or repairs made, or which does not allege specifically what was constructed, unless a description of an improvement may be necessary under the peculiar provisions of the statute in order to show the right of a lien."

27 *Cyc.* 371, 372.

We submit that the Washington Statute contains no such "peculiar" provision. Quite the contrary, it re-

quires only a description of the property, and says nothing concerning a description of the "building or improvement."

In addition to all this, there is a statute in Washington as follows:

> "The provisions of law relating to laws created by this chapter, and all proceedings thereunder shall be liberally construed with a view to effecting their objections."

R. & B. Cd. & St. of Wn., Sec. 1147.

For these reasons we submit that the bill was sufficient to support the decree.

THIRD.

The third division of appellant's argument is made under the head that an excessive amount was allowed in the decree. This branch of the argument partakes of the nature of a transcript or statement of facts. If the facts were as therein stated, and those were the only facts, appellant might have ground for deeming itself aggrieved. An examination of the transcript, however, shows that no error was committed in this respect.

Perhaps the best manner in which to place the court in possession of all the facts concerning this alleged error will be to recite, step by step, portions of the

transcript necessary for a complete understanding of these questions, and then to make specific references.

The lien filed and in evidence, and a copy of which was attached to and made a part of the bill (Transcript 17), contained the following:

> "That the reasonable value and agreed price of said material so sold and delivered was and is the sum of Twenty-two Thousand Four Hundred Ninety-eight and 97-100 dollars ($22,498.97).
>
> "That the sum of twelve thousand one hundred sixteen and 10-100 dollars ($12,116.10) has been paid in money and in just credits allowed to said M. A. Phelps Lumber Company."

The sum paid in the two manners provided in the two manners provided in the contract, other than by notes, being freight and cash, was $10,514.75. (Exhibit 121; Transcript 230, 388.)

The reference to amendment in the transcript, other than the order in itself and the affidavits of solicitors, is brief, and is as follows (Transcript 319):

> "MR. EDGE (Solicitor for complainant): I have added to the claim in our equity case $1,601.25. That is the amount that is admitted and the receipt is attached, and I have also added a prayer to the complaint for that amount, making the total demand in the equity case $7,483.98."

Appellant made no objection to this action by respondent (Transcript 310).

The order of which complaint is made (Transcript 374) recites, among other things, the following:

> "And it appearing to the satisfaction of the Court that the demand in the original complaint was framed upon a basis of an offer and tender to defendant of a credit and off-set of one thousand six hundred one and 25-100 dollars ($1,601.25).
>
> "And it appearing further that said defendant refused to accept said tender credit as an off-set on the contract in cause of action described in said amended complaint, and that said defendant in open court elected and chose to take and receive said credits or such other, lesser or greater sum of credit to which it might appear that said defendant became entitled in the premises as and for an off-set against other obligations due from defendant to complainant, to-wit: as an off-set upon the promissory note above referred to and to the payment of which said note said defendant was authorized and permitted and asserted said credit as aforesaid.
>
> "And the Court having heard said motion and statements of counsel, and being advised in the premises,
>
> "It is hereby ordered that said motion be, and the same is hereby granted, and that the lien of said plaintiff be amended in such manner as to include said judgment."

As stated in appellant's brief (pg. 19), this order was signed at the time the final decree was signed. It

was by the court dated back in order to conform with its permission of amendment given at the trial.

Appellant's solicitor on June 24, 1912 (Transcript 375), filed motion to vacate this order. In support thereof it at the same time filed the affidavit of its solicitor (Transcript 376). This affidavit was as follows:

> "JAS. A. WILLIAMS, being first duly sworn, on oath says: that he is one of the solicitors for defendant above named and makes this affidavit on its behalf; that affiant has at all times been the solicitor representing defendant, who has had charge of this litigation on its behalf; that no application for the said order bearing date April 15, 1912, and purporting to have been filed on the same date, was ever made, and no notice of such an application was ever given defendant or its solicitors, and the said defendant and its solicitors were not represented or present at the time any such order was made; that no such order had ever been made up to April 25, 1912, but that at some time subsequent to the time last mentioned, the date of which is to affiant unknown, the said order was filed and defendant and this affiant had no knowledge of same at any time until mention was made thereof to affiant by Joseph S. McCarthy, solicitor for complainant, which suggestion was made about two weeks prior to this date; that thereafter affiant examined the files of the clerk of this court and found the said order."

Respondent's solicitor filed an affidavit resisting the

motion, which affidavit was in part as follows (Transcript 379, 380, 381):

> "* * * it appeared that said defendant was claiming and asserting a credit to which it alleged itself to be entitled, amounting to the sum of sixteen hundred and one and 25-100 dollars ($1,601.25).
>
> And it appearing to the satisfaction of the Court that the answer and cross-complaint in said equity case and said law case were practically the same, and that said defendant in each of said actions was claiming and asserting itself entitled to said credit, and it appearing that said plaintiff was willing that said defendant be given and credited with said sum in either of said actions, or such lesser or greater sum to which said defendant may prove itself entitled;
>
> And that the complaint in said equity case was prepared by allowing and tendering to the defendant the credit of said sixteen hundred and one and 25-100 dollars ($1,601.25), and that said defendant on said 17th day of April, 1912, elected and chose to take and receive said credit of sixteen hundred one and 25-100 Dollars ($1,601.25), or such other lesser or greater credit as it might be shown that defendant became entitled to, as and for a credit upon said law case, to-wit: as a credit upon the said promissory notes, and that the plaintiff, upon said election by said defendant then and there asked that the pleadings in said equity case be amended in such manner as to permit the plaintiff to withdraw said tender and credit of sixteen hundred one and 25-100 dollars ($1,601.25), and pray for judg-

ment for a demand increased by the sum of sixteen hundred one and 25-100 dollars ($1,601.25), which said permission was orally given then and there by the Court to the complainant.

That thereafter, and on or about April 23rd, 1912, affiant and James A. Williams, as attorney for defendant, were present in Court for the purpose of procuring the signing of the decree in said equity case. . . .

That at the time of the presentation of said forms of decree, on said 23rd day of April, 1912, the Judge of said Court suggested that the order amending the pleadings in said action be reduced to writing and presented for his signature. That affiant, at the time of preparing said revised form of decree, prepared also a form of said order in accordance with the suggestion of the said trial Judge, and that on said day, or the day following, served upon said attorney, James A. Williams, said proposed form of decree and said proposed form of said order; that at the time of said service said Attorney Williams read over said papers, and each of them. . . .

That at said time said Williams also stated he did not know that he had any objection to the said proposed form of order, but stated that if objection thereafter occurred he would be present at the time said proposed form of decree and proposed form of order were presented on said 25th day of April, 1912, for the signature of said decree. . . .''

Appellant's solicitor then filed affidavit in rebuttal of

that of respondent. This affidavit, among other things, contained the following (Transcript 382):

> "JAS. A. WILLIAMS, being first sworn, on oath says: That he is one of the solicitors for defendant in this action; that he has read the affidavit of Joseph S. McCarthy of date June 24, 1912, in opposition to defendant's motion to vacate the purported order of June 15, 1912. * * * that this affiant admits that he did consent to complainant amending one paragraph of the bill of complaint so as to admit a less amount of credit than was conceded therein, denies that complainant at any time asked leave to amend the complaint in this case except to change the amount of credit alleged in one of the paragraphs of the complaint so as to be $1,601.25 or less, * * *."

It will be observed that in this rebuttal affidavit that appellant's solicitor does not refute the statement in appellant's affidavit to the effect:

> "That thereafter, and on or about April 23, 1912 (the decree ultimately being signed at a later time), affiant and James A. Williams, as attorney for defendant, were present in court for the purpose of procuring the signing of the decree in said equity case. * * *
>
> "That at the time of the presentation of said forms of decree on said 23 day of April, 1912, the Judge of said court suggested that the order amending the pleadings be reduced to writing and presented for his signature. * * *"

It will be observed (Transcript 7) that according to the original contract appellee was to deliver "necessary" iron, etc. Some correspondence and negotiations took place between the parties (Transcript 419) with the object of appellant purchasing this material in the local market at Spokane, and charging same against the amount due on the contract, and this was the course ultimately followed.

It sufficiently appears from the above, therefore, that there were two obligations owing from appellant to respondent—one on account of promissory notes, and the other a claimed balance due respondent in addition to said notes—that appellat upon either of these obligations should have credit or offset allowed to it for the said necessary iron, etc.—that one action was pending on said notes and another (the suit here involved) on the balance due above to said notes—that to allow appellant to offset the value of the same paid by it for this necessary iron, etc., in the action on the notes, and to credit said sum as a payment herein, would be to permit appellant to be twice repaid for this item of credit.

With this in view the admissions in the rebuttal affidavit of appellant's solicitor became significant. These admissions (Transcript 383) are as follows:

> "* * * except that this affiant admits that he did consent to complainant amending one paragraph of the bill of complaint so as to admit a less amount

of credit than was conceded therein. * * *"

And continuing further in his affidavit the appellant's solicitor

> "* * * denies that complainant at any time asked leave to amend the complaint in this case except to change the amount of credit allowed in one of the paragraphs of the complaint so as to be $1,601.25 less. * * *"

As stated above, no objection was made or exception taken at the trial by appellant to respondent amending its pleadings—in fact it states in its solicitor's affidavit that it did consent to certain amendments of the bill involving this item.

Now the lien was attached to and made a part of the bill. Amending the bill of necessity amended the lien. This lien is a creature of the laws of Washington, and with reference to construction of pleading concerning same the laws of that state provide:

> "The provisions of law relating to liens created by this chapter, and all proceedings thereunder shall be liberally construed with a view to affecting their objects."

Rem. & Bal. Codes & Stat. of Wash., Sec. 1147.

Now if the pleadings are to be construed liberally to affect the object of the lien, the object of respondent in making this amendment was apparent at the time to

appellant, and if the amendment of the pleadings and the lien may be made in the manner in which same were made, then the only remaining question is as to whether or not the lien may be amended after the usual ninety day period within which a lien may be filed. (The mode of amendment is also disclosed in the following citations.) The Statute of Washington relating to amendment of liens contains the following:

> "* * * Such claim of lien may be amended in case of action brought to foreclose same by order of the court as pleadings may be in so far as interests of third parties shall not be affected by such amendment."

> *R. & B. Codes & St. of Wash.*, Sec. 1134.

The question of the right to amend the lien by amendment of pleadings *after* the usual ninety day period within which the lien may be filed has been passed upon by the Supreme Court of Washington.

> "Upon the trial, which was more than ninety days after the furnishing of the material, the court permitted the complaint and notice to be amended. The nature of the amendment is thus referred to in the findings of fact:

> 'That after the introduction of the testimony, the court permitted the plaintiff's lien to be amended so as to be a lien upon the leasehold interest held by the said W. & J. Sloane Co., and also permitted the amendment of the complaint to be

made accordingly.'

It then entered its decree establishing the lien against the leasehold estate of W. & J. Sloane Company, and providing for its foreclosure, and the company appeals.

"The defect in the notice, claimed by appellant, is the failure to refer to the lease of Sloan Company, or to claim a lien upon the leasehold estate. This, appellant suggests, was not cured by the amendment, and that the amendment came to late in that it was permitted after the expiration of the statu ory time for filing lien. If it were not for the amendment, this claim of error would have much force. We think, however, the amendment cured the defect, if any, and that the fact that it was made after the expiration of ninety days is immaterial. Many cases hold in accordance with appellant's contention, both as to the defect in the lien and the lateness of the amendment, but such holdings are made under statutes not as liberal in their provisions for amendment as ours, and therefore we do not regard them as controlling; or if made under statutes permitting amendments, are not in accordance with the rules heretofore announced by this court. We can only refer to the amendment in the language of the findings above quoted, as we fail to find the amendment in the record. If the effect of it was as indicated by the court in the finding, then there is no question in our minds as to its efficiency. Neither did it come too late. The rule of amendment established by this court is that amendments of this character are in the nature of amendments to pleading, and the same liberal rule

as to substance and time should be followed where the interests of third parties are not injuriously affected. Such is the plain import of our statute. Rem. & Bal. Code, Sec. 1134, 1147; Sullivan v. Treen, 13 Wash. 261, 43 Pac. 38; Olson v. Snake River Valley R. Co., 22 Wash. 139, 60 Pac. 156; Malfa v. Crisp, 52 Wash. 509, 100 Pac. 1012. Other jurisdictions, with similar amendment statutes, adopt the same rule. El Reno Elec. Light & Tel. Co. v. Jennison, 5 Okl. 759, 50 Pac. 144."

Stetson & Post Lumber Co. v. Sloane Co., 61 Wash. 180 at 181.

Appellant is before a court of equity. It admits that it did "consent to complainant amending one paragraph of the bill of complaint so as to admit a less credit * * *" (Transcript 383). It will not be permitted to assert its own bad faith. It could not have intended that its consent amounted to no more than a husk. It was for the court to certify the transcript which constituted the statement of facts. This order complained of recited that certain facts had taken place at the trial. It is immaterial whether or not this portion of the transcript is set up in the form of an order or whether or not it appeared otherwise in the transcript. The attention of the trial court was specifically directed to the matter and to the contents of the order by appellant's motion to set same aside, and at the hearing of said motion the facts were found

adversely to its contention. Appellant cannot be aggrieved by the court's action in this respect. If the court had set aside the order the court would then have the right, and it would have been the duty of the trial court to have certified that the proceedings as set out in the order had actually taken place.

The other branch of appellant's complaint, that the decree was entered for an excessive amount, relates to the alleged absence of sufficient evidence. The evidence on this point is so voluminous that no analysis of it can be made short of a repetition of the entire transcript. Suffice to say that under date of July 22, 1911, at Spokane, Washington (being long after the last material had been delivered), the appellant rendered and presented to respondent's president a statement of account growing out of the material sold, which statement is in evidence as plaintiff's exhibit 121 (Transcript 330, 388). This statement was as follows:

"Spokane, Washington, July 22, 1911.

McDonough Manufacturing Company, Eau Claire, Wisconsin
In account with M. A. Phelps Lumber Company,
Spokane, Washington.

By Original Contract for Sawmill Machinery and equipment, etc	$18,750.00
Extra Boiler, and setting three boilers	2,675.00
Extra for Boiler Feed Pump for third boiler	46.13
Extra Nigger Bar, complete, (McIntyre's quotation)	75.00
Freight on same	12.00
One 12 inch Band Saw	89.00
Freight on same	4.10
	$21.652.13
Less allowance for eliminating hog	284.00
	$21,368.13

1911				
Feby	2	To Frt Pd on C/o Mchry	$ 633.00	
	10	do	499.50	
	,,	To Note 2/10/11	1173.50	
	15	To Frt pd on c/l machinery	578.50	
	18	To cash on account	842.75	
	,,	To note of 2/17/11	842.75	
	21	To Bals Frt Pd a/c C/l Machy	20.00	
	25	To Cash on account	1190.75	
	,,	To Note of 2/24/11	1190.75	
Mch	7	To frt pd on c/l machy	521.12	
	28	T do	739.40	
Apl	20	To cash on account	592.05	
	,,	To note of 4/20/11	592.05	
	21	To frt pd on c/l boilers	612.09	
	26	To frt pd on c/l machy	284.63	
May	4	To Frt Pd on C/l Boilers	387.60	
	8	do	434.44	
	11	To Cash on account	701.19	
	16	To note of 5/15/11	701.19	
	22,	To Frt Pd on C l Boiler Mtl	570.10	
June	16	To Cash Pd Muskegon Blr, men	300.00	
			15049.61	
Apl	26,	Less Refund on Frt overchg	34.62	15.014.99
				$6,353.14

To Cash advanced; and actual labor, material and freight necessarily furnished by us for completion of contract in accordance with specifications, as per itemized statement attached

Credit Balance,

(Attached to above was another sheet containing itemized statement as follows:)

"Spokane, Wash., July 26, 1911.

McDonough Manufacturing Company, Eau Claire, Wisconsin.

To M. A. Phelps Lumber Company,

Spokane, Washington, Dr.

1911.				
Jany	7	Paid for Blue Prints for Boiler & Engine setting plans		$ .80
May	1	Cash advanced to representative Wm. McIntyre		40.00
	2	Cash advanced to representative Wm. McIntyre (Apl.)		20.00
	19	Newport Iron Works, key-seating slasher shaft, & frt		2.70
	20	Marshall-Wells Hdwe. Co., Frt on Mtl		11.05
	31	Marshall-Wells Hdwe. Co., Mtl		141.48
June	3	Wash. Machy. & Supply Co., Mtl		53.41
	3	Marshall-Wells Hdwe Co., Mtl		38.13
	12	Holley-Mason Hdwe. Co., Mtl		412.83
	16	Advanced to boiler installers, Muskegon Boiler Works		300.00
July	7	Union Iron Works, Mtl		32.40
	25	Statement of Supt. John R. Bond, Lbr. & Mtl.		295.97
		Welding connecting rods, on kicker		10.00
		Crane Company, Mtl.		23.61
	10	Newport Iron Works, Mtl		10.40
	12	Newport Iron Works, Mtl		6.60
	14	Spokane Saw Works, Mtl		32.10
		Total		$2,463.94
		Credit:		
One 6-inch Check Valve			$17.40	
One 6-inch Expansion Joint			17.64	35.04
				$2,428.90

It will be noted by the above (aside from the itemized attached sheet, being a claim for a credit for materials, etc., claimed to be necessary, being for $2428.90) that aside from the latter, and which appellant asserted against the notes, that appellant acknowledged by that statement a balance due from it to respondent, in addition to said notes, amounting to $6353.14 It will be noted that this acknowledged amount fell short by only $644.20 of the amount for which the decree was entered. It will be noted, too, that appellant has twice included a payment of $300.00 to the Muskegon Boiler installers, making the amount actually less by only $344.20 of the amount for which the decree was entered.

And as stated this is using the statement of appellant as to the items which it conceded as having purchased as extras, yet among proven extras *not* found in the above statement, together with the pages of the transcript on which testimony concerning same may be found, are the following: Steam drum or header to extend over third boiler (329, 333, also 313); boiler conveyor stand (310-311); conveyor for lath room (313); additional log haul chain (317-318); bracket box for bevel gears (322); boiler conveyor; steel cleats (324); set collars (326).

Another mode of calculation discloses that no error

was committed in the entry of the decree for the amount for which same was entered. The amount of the original contract was $18,750. Respondent's president testified (Transcript 257) that "There are $4000.00 worth of extras in that contract, almost a carload." The detailed evidence making up these are covered in more than fifty pages of the transcript, being chiefly found from pages 310 to 360. Adding the $18,750 and the $4000 proof was made of an obligation amounting to $22,750. From this amount taking the alleged payments as shown by appellant's above statement, and made in the three modes—cash, notes and freight—and amounting to $15,014.99 (allowing credit for necessary iron, etc., to be asserted against the notes) shows a balance for which the decree might have been entered, of $7635.01, while the decree was entered for a sum less by $637.67, namely, for the sum of $6997.34, exclusive of attorney's fees and costs.

As argued on page 23 of appellant's brief, it made a claim on account of cutting and threading piping. Other than the installation and setting of the battery of boilers appellee neither directly nor through others undertook the installation of any material whatever. It may well be doubted but that the cutting and threading of this piping was a part of appellant's own duty, being a part of the construction of the plant.

Appellant complains that it should have been given

credit for broken band wheel, yet its own witness Bond testified (Transcript 143) that "it might have been two weeks" that this wheel was in actual use, being driven at the usual high rate of speed when "the upper wheel, the automatic gears refused to work, and ran into the upper wheel. Before this it was out of balance, and upon that running into the wheel we shut down and had a man fix it." (Transcript 120.)

Why automatic gears after two weeks use "refuse to work" may have been, and most likely was, due to the negligence or ignorance of employees, and why an attempt to charge this alleged damage to appellee only serves to illustrate the unwarranted nature of appellant's demands. It does not appear that any complaint was made to appellee concerning this band wheel until after it had been run into by the other wheel or machine.

Appellant also complains that it should have been given credit for a small sum advanced to one McIntyre, who was a previous agent or employee of appellee. No demand appears to have been made for this until long after the money had been advanced. It is most likely that this small advanced sum was made in the nature of a personal loan. The terms of the contract and the payment of the other larger sums, together with the execution and delivery of the notes, being direct dealing with the main office of the company, would seem to indicate

that McIntyre had no authority to receive payment. In any event the evidence was put in, and nothing appears to show that credit was not actually given for this sum, for the reason that as above shown the judgment was actually entered for several hundred dollars less than the amount for which appelle made proof. And moreover, as shown by the transcript, appellant was permitted to assert offsets against other obligations due from it to appellee, being the promissory notes described in the transcript.

On pages 25 and 26 appellant makes some complaint that it was not allowed alleged damages "by reason of failure of appellee to deliver the material in time." Such argument begs the question by assuming that appellee was responsible for this delay, if in fact same can be considered delay. These demands were of such unreasonable proportions, and so clearly speculative in nature, that even appellant seems, as indicated by its brief, to be somewhat repelled, and states therein that it does not want to burden the court by a discussion of all of same.

The real issue is, of course, as to who was responsible for the alleged delay. Appellant directed that many alterations be made and ordered much extras. "There was $4000.00 worth of extras in that contract, almost a carload" (Transcript 257). "An extra boiler, together

with the breaching that goes with the boiler so as to change the installation of boilers from a two battery to a three battery'' system was ordered by appellant. New work consisting also of erecting and setting the battery of boilers was included (Transcript 433). All this caused much confusion and necessitated voluminous correspondence to such extent that the plaintiff's president, speaking of correspondence concerning boilers, testified that ''We wrote them thirteen different letters on that subject,'' and concerning a letter written by appellant containing information as to the construction of part of the material, the same witness testified (Transcript 250): ''We wrote at least three different letters to get that letter.''

Now in addition to a consideration of all these alterations and demands for additional machinery, it must be remembered that appellee was to draw plans subject to the approval of appellant. These, of course, could only be drawn from general information furnished by appellant. The time of delivery was expressly made ''subject to strikes, accidents and other delays beyond your (appellee's) control'' (Transcript 9). If in the nature of things delay can at all be said to have taken place, it is plain that it was for causes beyond the control of appellee, and was caused by appellant's own requests for alterations and its failure to furnish com-

plete information concerning same. The transcript shows that from the outset appellant knew that respondent was dependent on an independent manufacturing company for the manufacture and delivery of the boilers. In the original contract the "Muskegon Boilers" were specifically designated and as the transcript shows a considerable portion of the correspond ence was carried on directly between appellant and the Muskegon Boiler Works of Muskegon, Michigan, copies of the correspondence in some instances being sent to appellee.

As stated above, appellee was to draw plans and specifications for the plant, and these, of course, could only be drawn from general information furnished by appellant. Among alterations which appellant directed may be noted the following: The letter of its president under date of July 18, 1910 (Transcript 430), stated that "The power house will be set ten feet from the mill on the right hand side." Under date of October 13, 1910 (Transcript 397), appellant wrote "We presume that you have heard that it will be necessary to build the power house on the opposite side of the mill from what was at first planned, on account of the lay of the ground." Under date of July 18, 1910, appellant wrote: "There will be a burner situated about 100 feet from the mill" (Transcript 430). This burner was afterwards

omitted, leaving an open fire pit, and appellant directed that the refuse conveyor be built out at an angle in order to throw the fire pit farther from the sorting works, with the object of avoiding increasing the insurance rate (Transcript 423, 426). Originally "Two (2) 72″ x 18″ Muskegon Boilers with steel settings, etc." (Ex. 20, Tr. 67, 388), were specified in the contract, and afterwards, on December 17, 1910 (Transcript 423, 464, 432), appellant ordered an extra boiler, and that the three be made in conjunction with one another so as to constitute one complete battery, and this only after first having detained appellee by causing it to procure figures and calculate upon changing the boiler system, not from a *two* battery system to a *three* battery system as at present, but to a *system of four boilers,* the appellant saying in its letter of September 21, 1910, that:

> "Also we wish to take up the matter of four boilers instead of two that we had up with your Mr. Hubbard when he was here" (Transcript 372).

On top of all this the good faith of the appellant in making its urgent demands for the machinery after it became apparent that it was impossible to deliver same on March 15, may well be doubted. The transcript indicates in the answer and cross-complaint of appellant, and in its correspondence in autumn, 1910, that much complaint was made as to the completeness of its plans.

Appellee put these matters in issue. Appellant made no attempt to prove these allegations—in fact, conceded the sufficiency of the plans. While these complaints were being made, and under date of November 4, 1910 (Transcript 402), the appellant wrote to the respondent:

> "* * * if this matter is delayed any longer it will be utterly impossible for us to have a frame erected this fall or winter, in which case we would not want the machinery delivered to us before May or June."

That appellant in fact did not desire the machinery shipped before May or June will be indicated by what we shall hereafter say with reference to the appellant not desiring in any event to carry on lumber manufacturing.

If appellant were to attempt to account for a great part of the alleged delay, confusion and alterations it could be assigned to the fact that appellant sought to construct its mill by an incompetent superintendent and incompetent help. One John R. Bond, whom respondent's president testified (Transcript 91, "* * * * had a working interest in a small amount of stock, or did have, of appellant," and who himself testified concerning his experience in constructing saw mill plants, said:

"I said that I never had constructed any entirely"

(Transcript 114) was first placed in charge of the work. When at the outset, with him in charge, appellee was being flooded with complaints about alleged defective plans, appellee suggested that appellant employ as superintendent one E. L. Kelley, a mill constructor of wide experience and recognized capacity (Transcript 275). The appellant afterwards discharged Kelley, saying in its letter of Dec. 22, 1910 (Transcript 425):

> "The writer was at Cusick yesterday and checked up the work there somewhat, and came to the conclusion that we would release, for the present any way, Mr. Kelley and the men that he brought with him, as Mr. Kelley does not seem to have the work pushed in the way that it should be * * * while we think that Mr. Kelley is competent to do the work that he should do, yet at the same time we think that he is an extremely expensive man."

Again in the spring of 1911 this man Bond was in charge, and while denying that he was the millright, yet handled correspondence with appellee concerning alterations, etc., in the machinery, signing at least one of the letters with initials "M. E.", after his name, as he testified, meaning thereby, "Mechanical Engineer" (Transcript 152), and "it was under his direction the machinery was set, what machinery was set while I was there, when I was in the employ" (Transcript 283) was the testimony of witness Shoemaker.

We have thus discussed at length the three alleged errors of which appellant makes complaint, and we believe that the trial court committed no error in concluding that the property delivered became a part of the realty, and that such was the intention of the parties; that the allegations of the bill sustained the decree establishing a lien; and that the amount for which decree was entered was fully sustained by the pleadings, and by the evidence, and for these reasons we respectfully submit that the decree should be affirmed.

McCARTHY & EDGE,

Attorneys for Appellee.

IN THE

United States Circuit Court of Appeals for the Ninth Circuit

M. A. PHELPS LUMBER COMPANY, a Corporation, *Appellant,* *vs.* McDONOUGH MANUFACTURING COMPANY, a Corporation, *Appellee.*	No. 2167

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

APPELLANT'S REPLY BRIEF.

DANSON, WILLIAMS & DANSON,
Counsel for Appellant.

Spokane, Washington.

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IN THE

United States Circuit Court of Appeals for the Ninth Circuit

M. A. PHELPS LUMBER COMPANY, a Corporation,
Appellant,

vs.

McDONOUGH MANUFACTURING COMPANY, a Corporation,
Appellee.

No.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

APPELLANT'S REPLY BRIEF.

Throughout appellee's brief there are many statements of fact which are not borne out by the record. In most cases the record is not referred to in confirmation of such statements. In many cases where reference is made to the record there is nothing found supporting the statements. It is not intended in this brief to point out such mis-statements, since the facts, as we understand them, are disclosed in the opening brief. The suggestion here made is only that the court should not accept as facts statements so made unless supported by

the record. There is no intention on appellant's part to admit such statements.

Appellee's discussion (Brief, 7) as to what constitutes a waiver of lien has no bearing in this case.

In Washington no lien attaches to realty unless that which was furnished and became the basis of the claim of lien, became a fixture or, in other words, lost its character as personalty and became a part of the realty. Appellant, in its opening brief, showed beyond question that whether a chattel becomes a fixture depends upon the manner *of annexation* and *the intention of the parties* making the annexation. The only question presented, then, is: Did the machinery undergo a change from chattels to fixtures?

Under the authorities cited by Appellant it is shown that the intention of the parties is of primary importance. Appellant also cited a long list of authorities holding that where title to the chattels remains in the vendor, *it is evidence of intention that the chattels were not to become a part of the realty or,* which is the same thing, *were not to become fixtures.*

The Appellee attempts to meet that contention and those authorities by citing a number of authorities to the effect that retention of title by the vendor does not amount to a waiver of a right of lien.

Appellant does not claim that a right of lien is waived or lost by retaining title or even that it is evidence of a waiver. Appellant does claim that a lien on realty cannot come into existence until chattels are so

affixed as to become a part of the realty; that they do not become so affixed if it is the intention of the parties that they shall not; and, that retention of title is evidence of that intention.

The first question to be determined is whether or not there is any foundation for a lien. If there is a foundation for a lien then the question of waiver or loss of lien may become of importance. If there is no foundation then the question of waiver or loss of lien becomes immaterial. Appellee's authorities do not go to the foundation; a question of fixtures was not involved in them.

The Case Manufacturing Co. vs. Smith, 40 Fed, 339, seems to be relied upon chiefly. It is not in point. Whether or not the chattels became fixtures was not called in question in that case. The only question involved was whether a vendor's lien and a statutory lien were inconsistent. Appellant herein contends that no statutory lien ever came into existence because the chattels never became fixtures. If there were evidence of an intention contrary to that shown by the provision in the contract, for retention of title in the vendor, and sufficient to outweigh it, then the question involved in the Case Manufacturing Co. case might be before this Court. Now it is not.

The above criticism applies to every case cited by Appellee (Answer Brief, pp. 7-16) and to the authorities cited by Cyc. in support of the rule quoted from 27 Cyc. 276.

It will be noted that the two lines of authorities have

nothing in common. No mention is made in cases of the one class of authorities in the other. Appellee's authorities have no bearing on appellant's contention. Both propositions of law are well settled and the statement that Appellant's authorities represent the minority and Appellee's the general rule was no doubt made by reason of confusion of the two propositions.

Appellee has cited Cyc. Federal and Michigan cases, among others, on the waiver of lien proposition. Appellant cited Cyc., Federal and Michigan cases, among others, laying down the rule applicable to this case. There is no conflict of authorities. The two lines of cases simply do not relate to the same subject matter. Appellee does not meet Appellant's contention — that the retention of title was evidence (conclusive in this case because there was none to the contrary) of an intention that the chattels should not become a part of the realty; that a lien attaches to realty only when the chattels, upon which the claim of lien is founded, become a part thereof; and, that therefor a lien never existed. There must be a fixture before there can be a right to a lien, and there must be a right to a lien before there can be a waiver or loss of a lien. The evidence shows that the machinery never became fixtures in this case.

Reference is made by appellee (Brief, 20) to a statement that Mr. Edge, of counsel for appellee, made at the trial concerning an amendment he proposed to make in the amended bill. If it should be assumed that this statement was made in the hearing of appellant's attorneys it nevertheless appears that Mr. Edge did not do

what he said he had done. The amendment was never made (Transcript, 2-8), and until there was an amendment there was nothing new to which appellant was required to plead nor anything new to which it was required to direct its evidence. It is apparent since the amendment was not made that counsel for appellee had a change of heart and concluded not to amend. The cause was tried on the pleadings as they existed. The lower court had no authority after the cause was tried to amend the pleadings to appellant's prejudice. By the pleadings on which the cause was tried a certain amount was claimed and there was an admission of a certain credit; while the pleadings remained in this condition it was not incumbent upon appellant to introduce evidence to prove that which was already admitted by appellee.

Appellee, at pages 23 and 24 of its brief, quotes from an affidavit made by its counsel, Mr. McCarthy, and concludes that certain portions of that affidavit are not denied because not specifically referred to in a reply affidavit (Brief, 25). It will be observed that in the opening affidavit filed by appellant (Brief, 22) it is alleged: "and no notice of such an application was ever given defendant or its solicitors, and the said defendant and its solicitors were not represented or present at the time any such order was made * * * and defendant and this affiant had no knowledge of same at any time until mention was made thereof to affiant by Joseph F. McCarthy, solicitor for complainant, which suggestion was made about two weeks prior to this date." That affidavit was made on June 24, 1912. There was

no necessity for appellant to reiterate a denial that had already been made in the first affidavit. It is said (Brief, 26) that in the rebutting affidavit it is conceded that appellant consented to appellee amending one paragraph of the bill of complaint. This is not denied, although there is nothing in the record to show same except the admission in said affidavit. However, as above stated, the amendment never was made to the bill and at that time presumbably appellee abandoned its intention to amend. The pleadings remained the same and necessarily the proof should be the same. Appellant was meeting the issues as made in the pleadings and evidence would not have been admitted to establish that which was already conceded

Appellee makes reference to a statement of date July 22, 1911, taken from appellant's books (Brief, 31-33). It will be noted that the amount shown on the statement, after giving credit only for the notes and cash and freight paid, is but $470.51 more than the amount claimed by appellee in its amended bill to remain unpaid, but when credit is taken as shown by this statement for the materials which appellee did not furnish and the other items shown on the second page of this statement of July 22, 1911, it appears that instead of the balance shown by such statement due appellee on the open account being greater than claimed in the amended bill, it is $1958.49 less than the amount claimed by appellee in the amended bill. Further, this statement purported only to be those things that were already entered on appellant's books. This statement was not introduced by appellee for the purpose of showing the

amount due it, but the purpose was to show that at said time appellant was making no claim for damages (Transcript, 230, 259, 260, 261, 304, 307, 308 and 309). At no time during the trial was there any issue made on the amount of the actual payments. The payments were conceded as alleged in the amended bill and there was nothing to prove in that respect, nor was there any attempt to prove anything on that point.

Appellee, at pages 38 and 39, suggests certain ways in which appellant delayed appellee in the performance of the contract. It will be noted that practically all here referred to occurred before the contract was finally consummated between appellant and appellee. What may have happened before the contract was made certainly would have no bearing nor would the fact that there may have been additional contracts afterwards made for additional machinery have any bearing. The fact that appellee accepted an order for additional machinery after the contract had been made would be no excuse for its failure to perform the original contract.

Respectfully submitted,

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Spokane, Washington.

IN THE

United States Circuit Court of Appeals for the Ninth Circuit

M. A. PHELPS LUMBER CO., a corporation. *Appellant,* *vs.* McDONOUGH MANUFACTURING CO., a corporation, *Appellee.*	No. 2167.

Upon Appeal from the United States District Court for the Eastern District of Washington, Northern Division.

APPELLANT'S PETITION FOR RE-HEARING.

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IN THE

United States Circuit Court of Appeals for the Ninth Circuit

M. A. PHELPS LUMBER CO., a corporation.

Appellant,

vs.

McDONOUGH MANUFACTURING CO., a corporation,

Appellee.

No. 2167.

Upon Appeal from the United States District Court for the Eastern District of Washington, Northern Division.

APPELLANT'S PETITION FOR RE-HEARING.

Appellant respectfully petitions the above entitled court for a re-hearing on the opinion filed February 3, 1913.

The opinion is based upon the theory that the machinery furnished by appellee became permanently attached to the realty and that it was the intention of the parties that it should become a fixture within the legal definition of that term.

The Washington laws provide for a lien upon real estate *only.*

> *Remington & Ballinger's Annotated Codes & Statutes, of Washington,* Section 1129;
> *Fuller & Co. vs. Ryan,* 44 Wash. 385, 7; 87 Pac. 485, 6;
> 27 *Cyc.* 31.

When chattels have lost their identity as such and have become merged into real estate and have become a part thereof, then a right to a lien is given, and not until then.

> *American Radiator Co. vs. Pendleton,* 62 Wash. 56, 7; 112 Pac. 1117;
> *Gasaway vs. Thomas,* 56 Wash. 77, 9; 105 Pac. 168;
> 27 *Cyc.* 38.

The question then is, Did the machinery become a part of the realty?

Appellant was bound to allege and prove the existence of three things before the court could, under the authorities, answer this question in the affirmative:

"The true criterion of a fixture is the united application of these requisites: (1) Actual annexation to the realty, or something appertaining thereto; (2) application to the use or purpose to which that part of the realty to which it is connected is appropriated; and (3) the intention of the party making the annexation to make a permanent accession to the freehold."

> *American Radiator Co. vs. Pendleton,* 62 Wash. 56, 7 and 8; 112 Pac. 1117;
> *Gasaway vs. Thomas,* 56 Wash. 77, 9; 105 Pac. 168;

Filley vs. Christopher, 39 Wash. 22, 5; 80 Pac. 834.

"An evident corollary of the modern rule thus established is that the burden of showing the existence of these requisites for merger, including the intention, is upon the party claiming the chattel to have become merged in the realty * * *.

"As to the intention, of course, it is not the unrevealed, secret intention that controls. It is the intention indicated by the proven facts and circumstances, including the relation, the conduct, and the language of the parties—the intention that should be inferred from all these."

Hayford vs. Wentworth (Me.), 54 Atl. 940, 1.

The appellee did not plead actual annexation, application, nor intention to make a permanent accession. Furthermore, the appellee did not offer any evidence for the purpose of proving such facts. Evidence is given effect only as proof of the facts which the one introducing it was seeking to prove with it. That such is the law is too well settled to require citation of authorities.

In the opinion it is said:

"We think there was an allegation and evidence in that respect sufficient to justify the decree of the court below. It appears from the testimony that the material and machinery were designed and manufactured to fit a certain building, that the machinery was all placed in the building and became a part of the mill; that bridge ties were run out from the sides of the mill after the machinery was placed in it, to which the machinery was bolted, that there were three large stationary steam boilers, that steam and water pipes connected them with other portions of the machinery, and that the boilers were set upon a masonary foundation with 'Dutch Oven

Work' of brick and fire clay underneath them, and that the entire plant was put into acutal operation for the manufacture of lumber, lath and planing-mill products."

Appellee directed the court's attention to the transcript, pages 9, 74, 100, 142, 161, 171, 173, 176, 281, 283, 404, 406, 409, 424, 426, 432, 451 and 462 for evidence showing annexation, application, and intention to make a permanent accession to the realty. There is nothing else in the record which could even be termed "evidence" of such facts. *The evidence disclosed in the record was not introduced for the purpose of proving that the machinery became fixtures.* The most that can be said is that an inference might be drawn from some of the evidence that some of the heavier parts of the machinery were fastened more or less securely in place. The court was not entitled to use the evidence for that purpose nor to draw the inference.

"It is plain that without some other facts, a court can not say as a matter of law that 'one steam boiler, one steam engine, one still complete, one doubler, one worm and worm tub, and one large tank,' are fixtures *pre se.* Nor is the court competent to draw from the evidence, however clear and uncontradicted it may be, an inference of the facts necessary to make them so."

Campbell vs. O'Neil, 64 Pa. St. 290, 2.

"The only evidence of actual annexation to the realty, besides their presence in the buildings, is the fact that the machines were fastened in place by lag screws. This is a screw with a nut head which may readily be turned by a wrench. This adjustable fastening held them to the floors, so that when in use they might not be jarred out of position by the motion of communicated power. None, even of the heavier and larger ones, were annexed

in any permanent way to the buildings or real estate. There is no evidence which indicates any intention that these machines should become either temporarily or permanently, a part of the freehold. * * * To determine that there has been a conversion, there must be evidence which shows an annexation of a character to indicate that there is a purpose to make the chattel a part of the realty. * * *

"The proofs in this case do show one of the elements necessary to support a conversion of chattels into realty. The machines were used for the same purpose to which the realty was appropriated. But this is not enough. All of the essential incidents must co-exist in order to effect a conversion. In this case there is no sufficient showing, either of an actual annexation of the machines, or of an intention to make them part of the freehold * * *."

Knickerbocker Trust Co. vs. Penn. Cordage Co. (N. J.), 50 Atl. 459, 65 and 66.

"Whether this machinery had been annexed to the realty, and by the annexation a permanent accession to the freehold was intended, is not shown by the evidence. Courts cannot know otherwise than through the medium of evidence the particular facts necessary to convert this character of property primarily personal into fixtures, or parts of the realty in connection with which it may be used. The burden of proving such facts, if from them they could derive benefit, rested upon the complainants. As the case is now presented by the evidence, the machinery must be deemed the personal property of the corporation in determining the character of the transfers to the appellants."

Bank of Opelika vs. Kizer (Ala.), 24 So. 11, 14.

See also:

Haas Etc. Co. vs. Springfield Etc. Co. (Ill.), 86 N. E. 248, 52 and 53;

Johnson vs. Moser (Ia.), 47 N. W. 996;
Parker vs. Blount Co. (Ala.), 41 So. 923;
5 *Encyc. of Evi.* 757.

There is no evidence in the record from which it could have been determined by the court that any of the machinery or supplies had been annexed to the realty, much less that there was an intention that the whole or any part was intended to become permanently attached. The evidence goes no further than to show that certain chattels were furnished appellant to be used in a sawmill. Evidence showing whether or not they were annexed to the realty, the manner of attachment, if attached, and the intention to permanently attach, is wholly wanting.

Appellee did not attempt to prove facts showing that the machinery became fixtures. On the other hand there is positive evidence that it was intended that the machinery should not become a part of the realty or fixtures.

In the contract it is provided that the "title to the property mentioned above shall remain in the consignor until fully paid for in cash" (Transcript, 10). Such a provision is positive evidence negativing an intention that the chattels should become fixtures.

"And the stipulation of the vendor in each of these cases, that the title to the property furnished by it should not pass until it had been paid for by the purchaser, precludes the idea that either of them intended that the machinery furnished by it should become a part of the realty until payment had been made; as to impute a different intention would be to suppose that neither intended the benefit of a stipulation exacted with the greatest care in its own behalf. In such case the in-

tention of the purchaser must be regarded as subordinate to the prior intention of the vendor, expressed in the agreement by which he has possession of the property."

Case Manuf'g. Co. vs. Garver (Oh.), 13 N. E. 493, 7.

"The case is ruled by Adams vs. Lee, 31 Mich. 440, and Robertson vs. Corset, 39 Mich. 777. In Adams vs. Lee the court said: 'All the time, therefore, the parties have had title to the machinery distinct from their title to the land, and this fact of itself is conclusive that the former was personalty, for to constitute a fixture there must not only be physical annexation in some form to the realty, but there must be unity of title, so that a conveyance of the realty would of necessity convey the fixtures also. When the ownership of the land is in one person, and of the thing affixed to it is in another, and in its nature is capable of severance without injury to the former, the latter cannot, in contemplation of law, become a part of the former, but must necessarily remain distinct property, to be used and dealt with as personal estate only."

Lansing Iron & Engine W'ks. vs. Walker (Mich.), 51 N. W. 1061, 2.

"There could be no clearer expression of an intention than an agreement that the property should remain the property of the vendor, although placed in possession of the proposed purchaser."

Harris vs. Hackley (Mich.), 86 N. W. 389, 90.

See also:

Harkey vs. Cain (Tex.), 6 S. W. 637, 9;
General Electric Co. vs. Transity Equipment Co. (N. J.), 42 Atl. 101, 5;
Campbell vs. Roddy (N. J.), 14 Atl. 279, 81;
John Van Range Co. vs. Allen (Miss.), 7 So. 499;

Cherry vs. Arthur, 5 Wash. 787, 8; 32 Pac. 744;
Washington National Bank Etc. vs. Smith, 15 Wash. 160, 69 and 70; 45 Pac. 736;
Holly Mfg. Co. vs. New Chester Water Co., 48 Fed. 879, 87; 53 Fed. 19;
19 *Cyc.* 1048;
Smith vs. Bay St. Sav. Bank (Mass.), 88 N. E. 1086, 8;
Buzzell vs. Cummings (Vt.), 18 Atl. 93, 4;
Hawkins vs. Hersey (Me.), 30 Atl. 14, 15;
Lansing Etc. Wks. vs. Wilbur (Mich.), 69 N. W. 667, 8;
Warren vs. Liddell (Ala.), 20 So. 89, 92;
N. W. Mutual Life Ins. Co. vs. George (Minn.), 79 N. W. 1028.

The writer of the opinion says about this contention and the foregoing authorities:

"Those authorities are all aside from the question which is before us The question here is whether the appellee's right to claim a mechanic's lien has been waived by the terms of the contract."

Appellant respectfully urges that the question of intention *is* before the court and that these authorities are squarely in point and the law laid down therein is sound and applies to this controversy. The provision of the contract simply constitutes *evidence* of an intention not to make the machinery a permanent accession to the freehold. It is not claimed by appellant that it constitutes a *waiver* of a right of lien, if there were an intention to make this machinery a permanent accession. The question before the court was whether or not appellee proved that this machinery became a fixture. A right

of lien must exist before it can be waived. Appellant contends that there is no proof that a right of lien ever came into existence.

Returning to the allegation which was considered sufficient by the writer of the opinion. It was alleged that the machinery "was sold and delivered to the defendant for use in the *erection of a sawmill* * * * and was by said defendant used in the erection of said sawmill upon said premises" (Transcript, 7).

Appellant submits that the allegation that the machinery was used in the erection of a sawmill is not the equivalent of an allegation of actual annexation to the realty, application to the use for which the realty was appropriated, and intention of the party making the annexation to make a permanent accession to the freehold.

Sawmills are of two kinds, permanent and temporary. The same machinery is used in each kind and in both cases it must be bolted so that it will not vibrate too much. The latter are put up where the supply of timber is limited. This is common knowledge. That allegation may refer to one as well as to the other. Technical pleading is no longer required but the material facts must still be alleged and proved. Accuracy is still a requisite. The opinion sets a precedent for loose pleading.

Evidently the pleader did not have in mind that it was necessary to allege or prove those facts and the

allegation was not intended to have the effect given it.

It is respectfully submitted that appellant should be granted a re-hearing.

DANSON, WILLIAMS & DANSON,
Counsel for Appellant,
Spokane, Wash.

It is hereby certified by Jas. A. Williams, a member of the firm of Danson, Williams & Danson, counsel for appellant, that in his judgment the foregoing petition for a re-hearing is well founded. That it is not interposed for delay.

Jas. A. Williams

No. 2169

United States Circuit Court Of Appeals

FOR THE NINTH JUDICIAL CIRCUIT

JAMES BOLAND,

Plaintiff in Error,

vs.

GREAT NORTHERN RAILWAY COMPANY,
(a corporation),

Defendant in Error.

TRANSCRIPT OF RECORD

Upon Writ of Error to the United States District Court for the Western District of Washington, Southern Division

The Bell Press, Printers.

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No.__________

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In the District Court of the United States for the Western District of Washington, Western Division.

JAMES BOLAND,
Plaintiff in Error,
vs.
GREAT NORTHERN RAILWAY COMPANY, a Corporation,
Defendant in Error.

Stipulation and Praecipe for Transcript

IT IS STIPULATED between plaintiff and defendant in error that the transcript of the record shall include only the following papers, to-wit:

1. Complaint.
2. Amended Answer.
3. Reply.
4. Verdict.
5. Judgment.
6. Motion for a new trial.
7. Order overruling motion for new trial.
8. Bill of exceptions and order settling same, and instructions of the Court.
9. Assignments of Error.
10. Bond on Writ of Error.

It is further stipulated that none of the exhibits need be copied or sent forward to the Circuit Court of Appeals.

It is further stipulated that the Clerk in printing the record may omit from the various papers copied, as above agreed on, the heading and title of the cause,

other than the description of the particular paper, also omit all endorsements on said papers of filing marks, service returns, verifications and receipts.

HEBER McHUGH,
JOHN T. CASEY,
Attorneys for Plaintiff in Error.
F. V. BROWN & F. G. DORETY,
Attorneys for Defendant in Error.

Complaint

The plaintiff, above named, by his attorneys, the subscribers, for his cause of action, alleges, states and avers:

I.

That plaintiff is a minor over the age of fourteen years of age, and that John M. Boyle was, on the 25th day of October, 1910, duly appointed his guardian ad litem, and that said guardian duly accepted said appointment.

II.

That the said defendant is a corporation, organized under the laws of the state of Minnesota, and was, at the times hereinafter mentioned, operating a railway from the city of St. Paul, Minn., to the city of Tacoma, Washington.

III.

That on or about the 7th day of August, 1909, this plaintiff was working for the defendant as a common laborer on its section, near mile post 12, between Seattle and Everett. That at said time he was a strong, healthy young man, with good eyesight. That he, to the knowledge of defendant, was inexpe-

rienced in the use of tools for the cutting of steel rails, and in the cutting of steel rails by the use of iron and steel tools.

IV.

That in the prosecution of his work as a sectionman as aforesaid, it became necessary and was a part of the duties of this plaintiff to use what is commonly called and designated as a cold chisel, being a tool similar to an ordinary chisel, the head of which is composed of soft iron or steel from which the temper and hardness are drawn so as to receive heavy blows from the hard hit of a hammer without causing pieces or portions of said tools to break, scale, chip or fly when struck together as aforesaid; that said cold chisel in use is held in one hand by the workman with its bit or hard end against the piece of iron or steel to be cut, while with a hammer or slight sledge the workman strikes upon the soft head of said tool for the purpose of cutting the object at which he is working. That said cold chisel and other tools used by plaintiff and other servants of the defendant similarly situated and employed are furnished and kept in repair by said defendant, and were so at the time before named.

V.

That it became and was the duty of the said defendant to furnish plaintiff and its other servants similarly employed with safe and suitable tools, and with safe and suitable cold chisels to be used in the usual and ordinary manner with the head thereof composed of metal of such softness and *elasticity* and

from which the temper and hardness had been removed that when struck with a hammer as aforesaid pieces of metal would not break, scale, chip or fly from either of said tools so as to endanger plaintiff and other servants of defendant, and to keep said cold chisels in good condition and repair and safe for use as aforesaid.

VI.

That the said defendant, disregarding its said duty, did at the time of committing the grievance hereinafter set forth, wrongfully and negligently furnish said plaintiff with an unsafe and unsuitable cold chisel, which was not of the proper softness, elasticity and temper to prevent the breaking, scaling, chipping and flying of the metal thereof when struck as aforesaid, but which cold chisel was of a hard and brittle metal wholly unfit and unsafe and not in good condition to be used for the purpose for which it was intended and for which it was furnished to plaintiff.

VII.

That on the 7th day of August, 1909, while plaintiff was so employed as a section man by defendant as aforesaid on its section, and while performing his labors in the usual and customary manner, it became and was necessary and proper for said plaintiff to use said cold chisel so negligently furnished him by said defendant, and that said plaintiff, while he held said cold chisel against a piece of a steel rail in the usual and ordinary manner, for the purpose of cutting off a piece of said rail, did then and there strike upon the head of said cold chisel with his hammer as he

was required to do in the performance of his said labors, and that by reason of said cold chisel so furnished by defendant being unfit and unsafe for the purpose for which it was furnished to plaintiff and to which it was applied by him as aforesaid in that the metal thereof was not of the proper elasticity, softness and temper as aforesaid, a piece or portion of said cold chisel broke, chipped and scaled from the head thereof when struck by plaintiff as aforesaid, and flew with great force and violence, striking plaintiff's right eye and penetrating the ball thereof, all without the fault or negligence of plaintiff while in the performance of his labors in the usual and proper manner and while he was in the exercise of due care and caution.

VIII.

That by reason of the injury aforesaid, plaintiff has become totally blind in his right eye and has suffered great pain and mental distress, and was forced to have the ball of said eye removed, and was and in the future will be obliged to undergo surgical and medical treatment. And that plaintiff by reason of said injury has been and in the future will be hindered and prevented from performing his usual labors and his earning capacity has been permanently impaired; whereby he has lost great gains and profits which otherwise would have accrued to him and will continue to lose such gains and profits during the remainder of his life.

That he will in the future be compelled to expend large sums of money for treatment and medical and

surgical care by reason of said injury. And the plaintiff further avers that by reason of the said injury and of the said negligent acts of the defendant he has been permanently injured in the loss of his right eye, and will suffer in the future great bodily pain and great inconvenience and annoyance in that his sight will be permanently impaired, his face disfigured and he will be compelled to endure the pain resulting from said injury, and that said injury will ultimately necessitate the impairment of the sight of the other eye as well. All to the plaintiff's damage Fifteen Thousand Dollars.

Wherefore plaintiff demands judgment against the defendant for the sum of Fifteen Thousand Dollars, and for his costs and disbursements.

(Filed Nov. 5, 1910.)

HEBER McHUGH,
JOHN T. CASEY,
Attorneys for Plaintiff.

Amended and Answer

Now comes the defendant and answers the complaint of the plaintiff herein as follows:

I.

Defendant has no knowledge or information as to the matters alleged in paragraph one of said complaint and so denies said paragraph and each and every allegation therein contained.

II.

Defendant admits paragraph two of said complaint.

III.

Answering paragraph three of said complaint, defendant denies that plaintiff was inexperienced in the use of tools for the cutting of steel rails, or in the cutting of steel rails by the use of iron or steel chisels or otherwise. Defendant has no knowledge or information as to plaintiff's strength or eyesight, and on said ground denies the allegations thereof in said paragraph.

IV.

Answering paragraphs four and five of said complaint, defendant admits that plaintiff was using a cold chisel and hammer, and that said chisel was used by holding it and striking it with a hammer, and that defendant furnished such hammer. Defendant denies said paragraphs four and five and each and every allegation therein contained, not herein specifically admitted.

V.

Defendant denies paragraph six of said complaint and each and every allegation therein contained.

VI.

Answering paragraph seven of said complaint, defendant denies that it was necessary or proper for plaintiff to use any cold chisel furnished by defendant negligently or any cold chisel not in proper condition to be used, or any chisel whatever; denies that a piece or portion of said cold chisel broke, chipped or scaled from the head thereof, or that it flew with great force and violence or at all, or that it struck plaintiff in the right eye or otherwise, or that it pen-

etrated the ball thereof, and denies that any injury plaintiff received was without the fault or negligence of plaintiff while in the performance of his labors in the usual or proper manner, or while he was in the exercise of due care or caution.

VII.

Answering paragraph eight of said complaint, defendant admits that plaintiff has become totally blind in his right eye, and that the ball thereof has been removed, but denies that this was by reason of any injury received in the manner stated in said complaint. Defendant has no knowledge or information as to the other matters in said paragraph eight, and upon said ground denies said paragraph and each and every allegation therein contained, not herein specifically denied; denies that plaintiff has been damaged by this defendant in the sum of Fifteen Thousand ($15,000.00) Dollars, or in any sum.

And for further, separate and first affirmative defense to the said supposed cause of action set forth in said complaint, defendant alleges that any injury or damages sustained by the plaintiff, as set forth in the complaint, herein, was contributed to by the negligence, imprudence and want of care of the plaintiff himself.

And for further, separate and second affirmative defense to said supposed cause of action, defendant alleges that any injury or damage that plaintiff has received as aforesaid was caused by and resulted from the ordinary dangers, risks and hazards of the occupation in which the plaintiff was then en-

gaged, and which were necessarily incident to said occupation, and which were well known to plaintiff, and that the risk of said danger and hazards, and said damage and injuries, was known to and assumed by plaintiff at and prior to the time of said injuries.

WHEREFORE, having fully answered, plaintiff prays that it may be hence dismissed with judgment for its costs and disbursements herein.

F. V. BROWN
FREDERIC G. DORETY
Attorneys for Defendant.

(Filed Apr. 26, 1911.)

Reply

Now comes the plaintiff, and for his reply to the answer of the defendant, alleges, avers and states:

I.

Plaintiff denies each and every material allegation contained in paragraph one of defendant's first affirmative defense.

II.

Plaintiff denies each and every material allegation contained in paragraph one of defendant's second affirmative defense.

Wherefore, plaintiff demands judgment according to the prayer of his complaint.

HEBER McHUGH—JOHN T. CASEY,
Attorneys for plaintiff.

(Filed Dec. 30, 1910.)

Verdict

"We, the jury empanelled in the above entitled case, find for the defendant.

N. W. HAYNES, Foreman."

(Filed Apr. 27, 1911.)

Judgment

The above action having come on regularly for trial on the 26th day of April, 1911, the plaintiff appearing in person and by his attorneys, Messrs. Heber McHugh & John T. Casey, and the defendant appearing by F. G. Dorety, its attorney; the jury having been duly empanelled and sworn, and evidence having been introduced on behalf of the plaintiff and the defendant, and both sides having rested and submitted their respective cases to the jury, and arguments having been presented to the jury on behalf of both parties; the jury having been instructed by the court and having retired to deliberate upon its verdict, and the jury having returned into court and declared its verdict in favor of the defendant,

NOW, THEREFORE, it is ORDERED, ADJUDGED and DECREED that the plaintiff take nothing by this action, and that the defendant have judgment against plaintiff for dismissal of this action and for its costs and disbursements herein, and that said defendant may go hence without day.

DONE in open court this 3rd day of May A. D. 1911.

GEORGE DONWORTH,
Judge.

(Filed May 8, 1911.)

Motion for New Trial

Comes now the plaintiff and moves the court to vacate and set aside the verdict and judgment in the above cause, returned and entered herein on the 27th day of April, 1911, on the following grounds and for the following reasons:

1. Irregularity in the proceedings of the defendant and the jury by which the plaintiff was prevented from having a fair trial.
2. Misconduct of the defendant and the jury.
3. Newly discovered evidence, material to the plaintiff, which he could not have discovered with reasonable diligence and produced at the trial.
4. Inadequate damages given under the influence of prejudice.
5. That the verdict is against law.
6. Error in law occurring at the trial and excepted to at the time by the plaintiff.

This motion is made and based on the records and files herein and on the evidence taken and submitted at the trial herein and on affidavits to be hereafter served and filed.

HEBER HcHUGH, JOHN T. CASEY,
Plaintiff's Attorneys.

(Filed Apr. 29, 1911.)

Memorandum Decision and Order on Petition for New Trial

DONWORTH, District Judge:

This case was tried in the Circuit Court during the February (1911) term, verdict rendered for defendant and judgment entered thereon. The Circuit

Court having been abolished this decision and order will be entitled and filed in the District Court.

At the oral argument of this petition two grounds were urged by plaintiff's counsel, first; misconduct of defendant's attorney in his argument to the jury; second; error of the court in admitting certain testimony relating to the scope of the authority of the foreman, Pat Bolland. At the hearing of the petition I held the first ground to be untenable and took the petition under advisement as to the second ground.

On an examination of the record of the proceedings at the trial which has since been submitted to me, I can not find that the court made any error in respect to the admission of testimony. The question of the position and authority of Pat Bolland was not settled by the pleadings, but was open to proof at the trial. Both parties had a right to introduce evidence touching that point and the evidence that is now criticised was proper and pertinent to the issue. The argument now made by the plaintiff's counsel is erroneous in that it assumes that what was shown by the plaintiff's evidence became an incontrovertible fact in the case. No proof by one party, however strong, prevents the other party from introducing pertinent evidence touching a point which is left open by the pleadings.

The instructions to the jury are not now complained of nor was any exception taken to them by plaintiff's counsel at the trial. If, plaintiff's counsel had desired an instruction limiting the purpose

or effect of the testimony which is now criticised, or an instruction stating with more particularity the duties of the defendant as a master to furnish safe tools, under this or that hypothetical state of facts, disclosed by the evidence, such an instruction should have been requested, or the attention of the court called to the point in some manner at the time. I have read the instructions since this petition was argued and they seem to be full and clear.

Every litigant is entitled to have one full and fair trial of his case. There appears no reason to doubt that such a trial was had in the present instance. I see no ground for setting aside this verdict and I do not believe that a fairer trial could be had if the case were to be tried anew. The petition for a new trial is therefore denied.

An exception is allowed to plaintiff.

GEORGE DONWORTH, Judge.

Bill of Exception

The above case coming on for trial in the above entitled court, on April 26th, 1911, before Honorable George Donworth, presiding judge thereof, and a jury duly empannelled, the plaintiff appearing by Heber McHugh Esq., and John T. Casey, Esq., his attorneys, and the defendant appearing by F. V. Brown, Esq., and F. G. Dorety, Esq., its attorneys, the following proceedings were had, to wit:

After the opening statement by plaintiff's attorney, the following testimony was introduced in his behalf:

Testimony of JAMES BOLAND on his own behalf.

The Plaintiff being called and sworn as a witness, testified as follows:

DIRECT EXAMINATION.

My name is James Boland; I will be 21 on this July; I was working at Richmond Beach on the 7th day of August, 1909, as section laborer for the Great Northern Railway; I had worked there since March first; I had not before the 7th day of August, used a hammer against another steel tool on that section; I had not used a cold chisel during my work on this section, or at any time before the day of my injury; I did not know at the time of the injury that slivers were likely to fly from the head of the cold chisel when struck with a hammer; I had never seen any slivers fly from cold chisels or other tools when struck with hammers; at the time of the injury I did not know anything about the crystallization of steel or the tempering or hardness of steel; at the time of my injury I was engaged at boring holes in rails, Nick Brown was helping me; the foreman sent us to bore holes in a rail to put in a guard block; we put in the bolt through the hole in the guard rail and through the hole in the block, and it would not come out in the hole on the rail that we bored. We told the foreman that our bolt would not fit, and he said, "You will have to bore another hole right alongside of that hole," and when the hole was bored there was two corners between the holes and he said we would have to get the hammer and chisel and cut

them out, and so I took the chisel and got down in the manner that he told me, and hit it about three times, and something flew and hit me in the eye, so I told Nick Brown, the fellow that was working with me, that I thought something hit me in the eye, and he looked at it, and he said he could not see anything in there; it was the right eye; I noticed something striking me in the eye just as I struck the blow on the chisel; Nick Brown said he could not see anything in the eye and so we looked at the hammer and the chisel, and right on the top of the chisel we saw a new speck where a piece of steel had flew out of there, and so we just thought the steel flew back and hit me in the eye and glanced off; we didn't find anything wrong with the hammer at all; so I then finished cutting out the chunk that was between the two holes and went home. (here witness was shown plaintiff's exhibit A for identification). That is the chisel I was using at the time I was injured; the head is in the same condition now that it was then; (here the witness shows the court and jury where the piece was that came off the top of the chisel at the time), it is along side the edge of the top.

Here exhibit A is offered and received in evidence. The foreman furnished the tools to work with on that section; the foreman hired and discharged the men there, during all the time that I had been there; there was nobody else there that furnished tools and hired and discharged men, except the foreman; there was no warning given me as to the condition of the

(Testimony of James Boland.)

tool. My eye was removed about six months later; I now wear a glass eye; the right eye; my left eye bothers me; my eyesight was good before I was injured.

CROSS EXAMINATION.

I don't know where the foreman got the chisel; I am sure I did not go over to the scow or engine and get it myself.

In my opinion it was never among the tools on my section, before the day of my injury. I knew it was not on the hand car and that the foreman did not go to the tool box to get it. If I had not bored a hole in the wrong place in the rail I would not have needed a chisel at all.

I never saw what you call a rail chisel, and don't know what it is. I do not know what kind of chisels they usually use for cutting rails. As to whether I would say, from my experience, that a rail chisel is not a necessary tool in a sectionman's equipment, I will say that I never saw one on a section and do not know whether there were any in the tool box or not. I never saw the chisel which I have offered in evidence before the day on which I was hurt.

A supply train came along while I was there. I think it is the train that brings the tools and takes them away to be repaired and brings new ones. I think the foreman obtains his tools from the supply car. I never saw them obtained in any other way.

REDIRECT EXAMINATION.

I didn't know the chisel was a defective chisel; I

(Testimony of James Boland.)

coundn't tell whether there was anything wrong with it or not.

NICK BROWN called and sworn as a witness, testified:

DIRECT EXAMINATION.

My name is Nick Brown; I live in Seattle; I was working with James Boland in 1909 when he was hurt. We had bored two holes with the drilling machine, and between the two holes the machine left two corners of steel. Jim Boland asked the boss how we were to cut off between the two holes; the boss is the foreman; the foreman came along and brought him the chisel, and he says, "Take that chisel and hammer and cut those two corners out"; then Jim did so, he sat down on the ground and he hit it a few times; then I seen him get up from the ground, and he held his eye and he said "Nick, something go in my eye—take a look at it." And so I looked at it and could not see anything. We looked at the hammer and chisel right away when Jim got hurt, and we saw a new place on the head of the chisel; (witness was here shown plaintiff's exhibit "A"). That is the chisel Jimmie used when he got hurt. I saw the new place right here (pointing), right in from the edge. We hadn't done any chiseling before that; I hadn't seen Jimmie do any.

I never used any chisels on the section, but I know that there were rail chisels with wooden handles in them in the tool box at the time of the accident. I

(Testimony of Nick Brown.)

do not know where the foreman got the chisel that we were using.

J. R. TURNER, the plaintiff's witness, being sworn, testified:

I live in Tacoma; am a manufacturer of steel tools; I have been engaged in handling, making and repairing of steel tools 40 years. The head of a chisel should be left untempered, so as to be of a soft nature, and not to chip off; being untempered it is tough, and when pounded on will receive the blow of the hammer and will naturally roll or burr over, not break away or fracture; the continual use of a cold chisel without dressing the head or annealing it, it naturally crystalizes; becomes brittle when crystalized; slivers are more apt to fly off when struck with a hammer; a cold chisel is a dangerous tool to use when it is crystalized and begins to fracture. When an experienced man sees that the head of a cold chisel is crystalized and dangerous the head should be repaired, the portions that show fracture should be cut away so as to leave solid head on the chisel; that is comparatively a simple matter. (Witness being shown plaintiff's exhibit "A," and testing it with a file). It is harder at that point than in the body of the tool, very similar to a tool that is tempered —it becomes hard so that the file does not cut it easily; an experienced man could easily tell by looking at the chisel that it is rather dangerous to work with, and should be dressed; if a cold chisel is either hard from tempering or brittle from crystalization,

(Testimony of J. R. Turner.)

scales are apt to form on the top and be thrown off when it is pounded on. I don't think an inexperienced man, one who had never worked with steel tools before, would know the danger of slivers or the likelihood of slivers flying off a cold chisel such as exhibit "A".

S. L. EATOUGH, the plaintiff's witness, being sworn, testified:

I am a tool dresser; have been engaged in that business about 21 years; during that time I have devoted my attention exclusively to repairing and sharpening tools and making them—working in steel altogether. (Witness was here shown plaintiff's exhibit "A"). The head of it has the appearance of being hard and crystalized, from the looks of it I should say that result was caused by being burned; the steel has been burned when it was made; it makes it brittle; and in that condition it would be a dangerous unsuitable tool; it could be repaired by cutting off the burned portion.

CROSS EXAMINATION.

This burning is the same as tempering, it is heated too hot and burned; it doesn't put the steel in the same condition as when it is tempered, it is spoiling the steel; it has the same effect as though it is crystalized so far as chipping is concerned, but it will do it quicker—it will break from the beginning, while the crystalization, it takes more time; when it is burned it will not burr over at all, it will break; plaintiff's exhibit "A" is not burred over on the edges

(Testimony of S. L. Eatough.)

at all—that is simply broke down—a cracking down.

JOHN MUNTZ, the plaintiff's witness, being sworn, testified:

I live in Tacoma; am a blacksmith; have followed that business about 30 years; I have made and repaired a great many steel tools—cold chisels; and understand how they should be made; the proper and customary way of making the head of a cold chisel is to leave it soft, so it won't fly; if it is tempered or has hardness, when you strike it, it would fly all over the place, and makes it dangerous; apt to hurt people; there is another way the head of a cold chisel becomes brittle and dangerous, besides tempering, it becomes crystalized by hammering a long time; a chisel in that shape is fully as dangerous as one which has been tempered; it is a very simple matter to repair it; by either cutting off the head or softening it; (witness examining plaintiff's exhibit "A") by the looks of it, I should say it is very hard and brittle, dangerous; by filing on it you can tell that it is hard; I could not tell whether that was produced by tempering or crystalization; cold chisels are made to be soft in the head that way, so that they broom over, so that they won't fly, they are dangerous when they fly; I think an experienced man could tell from an inspection of the head of exhibit "A" whether or not it was brittle and dangerous.

It was admitted that the guardian was duly appointed and qualified.

Plaintiff rests.

(Testimony of John Muntz.)

Defendant's challenge of sufficiency of the plaintiff's evidence and motion for judgment denied. Exception.

Defendant then introduced the following evidence:

CHARLES GABLE, the defendant's witness, being sworn, testified:

My name is Charles Gable. I am bookkeeper of the Electric Logging Company of Tacoma. During August 1909 I was chief clerk to the Superintendent of the Great Northern at Everett. About three or four days after the plaintiff's accident, he and his father called at my office, in response to instructions to bring in the chisel that had been chipped. The plaintiff brought a chisel with him that I now identify as defendant's Exhibit No. 3. It was handed to me by the plaintiff's father in the plaintiff's presence. The father told me that there was the chisel that caused the accident, and that the chip had broken off at the top. The plaintiff was then standing beside him.

JOHN CRAIG, the defendant's witness, being sworn, testified:

My name is John Craig; I have been section foreman for the Great Northern about 18 years;

Q. In your experience with the Great Northern have you ever known of their furnishing section men with chisels like plaintiff's exhibit "A" or defendant's exhibit "No. 3"?

Plaintiff by his counsel objected on the grounds

(Testimony of John Craig.)

that the evidence was incompetent, irrelevant, and immaterial;

The Court: Do you deny that the foreman furnished the tool in this case? That the foreman handed it to the plaintiff?

Mr. Dorety: Well we put them at issue on that; we put them to proof of it.

Objection overruled and exception noted for plaintiff.

A. No Sir; I never knew of that. I have ordered one like that, and they told me they did not furnish me with them (pointing to exhibit "A"), and this is not a chisel, Defendant's exhibit No. 3; this is a stone cutter's point, to cut holes in a rock to lift with the derrick.

The tools supplied to the section foreman came on a supply car; the foreman makes out a requisition on the first of the month for tools he wants, and on the last day of the month or thereabouts—on the 29th, may be to the second of the month ahead, he orders his tools and he gets them off the supply cars—returns his old tools and gets repaired ones in place of them.

Q. Does the section foreman have the authority to go and buy a tool and charge it to the company?

Plaintiff by his counsel objected on the grounds that the evidence was incompetent, irrelevant, and immaterial.

Objection overruled, and exception noted.

(Testimony of John Craig.)

A. No, Sir; I never had any instruction t[illegible]y any tools, and never was allowed to.

Q. Does the section foreman of the Great Northern have authority to obtain tools in any way except from the supply train on requisition?

Plaintiff by his counsel objected on the grounds that the evidence was incompetent, irrelevant and immaterial; objection overruled and exception allowed and noted.

A. Not as I know of.

The plaintiff had worked for me before the accident and had used a hammer and tools. He was one of the best men I had with the hammer. I have examined the work that the plaintiff did on the date of his injury. If it had been properly done there would have been no need of using the chisel.

Defendant's exhibit 3 looks like a stone cutter's point, left by one of the stone masons who had been building the sea wall along there. I never saw a chisel like either of the ones produced in evidence used in track work.

Exhibit No. 2 is a track chisel which is furnished for cutting rails. It has a wooden handle eighteen inches long with which it is held. They are furnished to all sections. All Great Northern chisels are stamped with the letters "G. N." I noticed some rail chisels on Boland's section shortly before the accident. A rail chisel would have been the practical tool for the plaintiff to have used.

P. H. McFADDEN, the defendant's witness, being sworn, testified:

(Testimony of P. H. McFadden.)

My name is P. H. McFadden; I reside at Everett, Washington; am Division Roadmaster on the Great Northern, Cascade Division; that included the track upon which the plaintiff was working, Pat Boland's section; the section foreman and the section laborers work under the Road Department's direction; that is my department; I was in authority over all section foremen including Pat Boland.

In the month of August, 1909, tools for the use on the sections, and one in which Boland was, were furnished by monthly supply cars; the section foreman makes a requisition monthly, and that order is filled at the store department and sent out in the supply car once a month, and in most cases it is accompanied by the assistant roadmaster; the tools that are furnished in that way pass inspection at the shops and the store houses at each point they are furnished from, and also by the assistant roadmaster, and many times by myself if I go up with the car, and on the section; the regular shop inspections are made before they are shipped; the duty of the assistant roadmaster is to inspect the tools, and any defective tools shall be shipped in and new ones returned in their place; the rule is to make a trip of inspection and supply of that sort every month; that is done by the assistant roadmaster.

All the foregoing paragraph admitted over objection by plaintiff and exception allowed.

Q. Is there any authority in any of the section foremen, under rules of the company, or did Pat

Boland have any authority in the month of August 1909, to procure tools in any other way?

Plaintiff by his counsel objected on the ground that the same is immaterial, irrelevant and incompetent. Objection overruled and exception allowed and noted.

A. None whatever. The job being done was putting in a guard rail.

Q. Would you consider that the necessity of that to be an emergency calling for the procuring of a tool in some way, if no suitable tool were on hand?

A. No. The matter could have remained in abeyance for several days or weeks and, I might say months, until the proper tool was supplied, if it was necessary to have that tool; the guard-rail would be held by guard-rail braces, which were supplied in that case; the guard-rail would perform its functions practically as well without the bolts, temporarily; one object of the bolt is to hold the foot-guard in place, our new standard guard-rail is supplied with a metal foot-guard; the foot-guard is a piece of steel at the end of the guard-rail to protect the brakemen or anyone walking on the track from getting his foot in there, and these bolts go through the guard-rail to hold that foot-guard to its place.

All the foregoing was over objection on ground of immateriality and irrelevancy, by plaintiff, and exception allowed.

Q. Will you state whether or not section foremen are required to make any regular inspections of the

(Testimony of P. H. McFadden.)

tools or any reports of the condition of the tools or anything of that sort?

Plaintiff objected because evidence was incompetent, irrelevant and immaterial, which objection the court overruled; exception noted.

A. They make requisitions for the tools, and in doing so they inspect them.

When the tools are supplied from the supply car inspection is made by the supplying party; the chisels marked plaintiff's exhibit "A" and defendant's exhibit No. 3, chisels of that kind are not furnished to section men of the Great Northern Railway Company; the chisel marked defendant's No. 2, is a track chisel; that is the regular chisel furnished to section men.

The foregoing admitted over objection and exception of plaintiff.

It is never the custom for the foreman to go and get a chisel from outside parties, even in an emergency. I never knew of its being done. In such a case he would make a special requisition to be delivered by passenger train shipment.

In doing the sort of work the plaintiff has testified to, a chip would be more likely to come from the rail than from the chisel. The object of using the chisel is to make chips fly from the rail. Such a chip would naturally fly toward the plaintiff.

JAMES BOLAND, plaintiff, in Rebuttal:

I was not with Pat Boland when he delivered exhibit 3, to Mr. Gable, at Everett; I never saw Mr. Gable before yesterday.

(Testimony of Patrick Boland.)

PATRICK BOLAND, for plaintiff, in rebuttal:

James Boland was not with me in the office at Everett when I gave exhibit 3 to Mr. McFadden; I did not give exhibit 3 to Mr. Gable; I did not tell Mr. Gable that the pice which hit plaintiff came from ex. 3.

PATRICK BOLAND, the defendant's witness, being sworn, testified:

My name is Patrick Boland; I am the stepfather of the plaintiff; was foreman of the section on which plaintiff was working in August, 1909, when his eye was hurt.

Q. Do you know where the chisel that James was using came from?

Plaintiff objected on the grounds that the evidence was incompetent, irrelevant and immaterial; exception noted.

A. Yes, sir.

Q. Where?

A. I gave it to him.

Q. Where did you get it?

Objected to by plaintiff on same grounds as above; objection overruled; exception noted.

A. I found it in the donkey engine.

Q. Where?

Same objection, same ruling; exception noted.

A. I found it on the scow.

Q. It was not a Great Northern chisel, was it?

Same objection; same ruling; exception noted.

A. No, I don't think it was.

(Testimony of Patrick Boland.)

RE-DIRECT EXAMINATION.

I had the regular standard rail chisel, a track chisel; I had track chisels like exhibit No. 2, I always carried them in my hand-car. (Admitted over objection and exception of plaintiff).

I am not working for the Great Northern now.

Both parties rest. The Court instructs the jury.

Instruction by the Court to the Jury

The Court:

Gentlemen of the jury, the incident which gave rise to this controversy took place in the month of August, something over a year and a half ago, at a point on the Great Northern Railway north of Seattle.

The plaintiff at that time was in the employ of the defendant and the case, therefore, involves the law relating to the mutual rights and obligations of master and servant, or as it is sometimes called, employer and employee.

The action involves the idea of negligence. It is predicated upon negligence. You have heard the definition of negligence so often that no doubt it is already well known to you, but to re-state it; negligence is the absence or the failure of the exercise of ordinary care. It consists in doing something which a person of ordinary care and prudence under the existing circumstances and conditions would not have done, or, on the other hand, omitting to do something which a person of ordinary care and prudence

under the existing circumstances would have done.

Now, while this is the legal definition of negligence, it is a question of fact as to whether negligence in fact existed or not, and you are to take this definition of negligence and apply it to the evidence in the case and say whether the defendant was negligent and whether the plaintiff was negligent, because either or both or neither may have been guilty of negligence, acording as you determine the facts to be from the evidence in the case.

Now, the plaintiff alleges that the cause of his injury was the failure of the defendant to perform its duty in reference to furnishing him a safe tool with which to work. Among other things in the complaint it is alleged that the defendant, disregarding its duty, did ta the time of committing the grievance hereinafter set forth, wrongfully and negligently furnish plaintiff with an unsafe and unsuitable cold chisel which was not of the proper softness, elasticity and temper to prevent the breaking, scaling, chipping and flying of the metal thereof when struck, but which cold chisel was of a hard, brittle metal and wholly unfit and unsafe and not in good condition to be used for the purpose for which it was intended and for which it was furnished to the plaintiff.

The allegations of negligence made by the plaintiff, only a portion of which I have read, are denied by the defendant, and the defendant affirmatively, in addition to denying the charge of negligence, sets up some affirmative defenses. The first one is that

the plaintiff himself in and about the occurrence producing the injury failed to exercise ordinary care on his part and was, therefore, guilty of contributory negligence.

The second defense is that the risks and dangers which brought about this injury were of the ordinary kind which usually—or which exist in this business independent of any question of negligence, and further that the defects which led up to the production of this injury, if it was produced, were apparent and were known to the plaintiff himself, so that he assumed those risks and dangers.

Those affirmative allegations of the defendant are denied by the plaintiff, so that it becomes important for you to know and bear in mind what obligations the law imposes upon a master in reference to the furnishing of proper tools to the servant.

The law does not make the master an insurer either of the lives or limbs of the employee—of the servant; the mere fact that the plaintiff while in the employ of the defendant received an injury of this character raises no presumption of negligence one way or the other. The question as to whether negligence existed is to be gathered by you—its existence or non-existence is to be gathered by you from all the evidence in the case.

Now, it is the duty of the master to provide the servant with reasonably safe tools and appliances for doing the work. "Reasonably safe" is the expression used in the law. It is not the duty of the master to furnish the most safe appliances or tools, the most

up-to-date, or one that is least likely to produce an injury. If the tool which is furnished is reasonably safe, then the duty of the master has been complied with.

In carrying out—in discharging this duty of providing a reasonably safe tool or tools it is the duty of the master to use ordinary care; that is to make such efforts; to take such precautions and do such things for the furnishing of a reasonably safe tool as a person of ordinary care and prudence under like circumstances and conditions would do. If the master uses ordinary care to that end, then he has discharged his full duty, and if an accident happens notwithstanding that exercise of due care, ordinary care, reasonable care by the master, then the master is not responsible, no matter how serious the injury may be.

It follows from this statement of the law that there may be accidents and injuries occurring within any employment which are not the result of negligence on the part of either party. If, for instance, in this case you should believe it to be the fact from all the evidence that the defendant exercised ordinary care to provide a reasonably safe tool or tools and that the plaintiff himself acted in an ordinarily prudent manner, yet, nevertheless, by reason of the flying off of a chip either from the chisel or from the rail, the plaintiff was injured, then that would be one of those accidents which inhere in every—in a business which may happen without the existence of negligence on the part of either party. Of course,

whether such a situation existed is entirely for you to determine from the evidence.

Now, this duty of the master, that I have spoken of, to exercise ordinary care to provide a reasonably safe tool or tools is said in law to be a duty that cannot be delegated. That is, that does not mean that the master may not, in fact, delegate it. He may do so; but whoever the master employs to perform that duty stands in the place of the master and his negligence is invariably taken to be the negligence of the master. It is delegable in that sense, if it is delegated nevertheless the delegate acts just the same as the master would and the master is chargeable for his neglect in any respect which amounts to a lack of ordinary care.

Now, there is a question of fact raised here as to whether the foreman, Pat Boland, was acting within the scope of his authority when he procured and furnished to the plaintiff the chisel with which this work was done.

Now, the authority of an employe or an agent may be shown in numerous ways. It is not necessary that the authority of an employee or an agent should be shown by direct evidence. It is not necessary to show the writing that gave him his authority nor bring some person who heard the directions given to him to authorize him to act. The authority of an agent, like most other matters, may be shown by circumstantial evidence; that is, it may be deduced from the facts and circumstances.

Now, whether the foreman was acting within the

scope of his authority in procuring this chisel and furnishing it, is a matter entirely for you to determine from all the evidence in the case.

You have the right to consider how he was acting and all the facts and circumstances surrounding the transaction concerning the usual performance of his duty and any other evidence in the case which throws any light, in your minds, as reasonable men, on the subject as to whether he was acting within the scope of his authority. If he was acting within the scope of his authority, then his acts are binding upon the defendant. If he was acting outside the scope of his authority then his acts are not binding upon the defendant.

Another question of fact in the case is as to what was the proximate cause of the injury to the plaintiff. The contention of the plaintiff is that during the use of this chisel, as I understand the contention of the plaintiff, that by reason of one of the strokes that the plaintiff made with the hammer against the chisel that a small particle of steel flew out from the chisel and entered his eye.

The defendant's contention is that that did not occur. It says if it did occur it did not come about from any negligence of the defendant and it further says that it did not happen at all. The defendant's contention is that a piece of steel from the rail was what flew back and made the trouble. Of course that is another question of fact for you to determine from the evidence in the case.

If Pat Boland was acting within the scope of his

authority, then if Boland, as representing the defendant, used ordinary care to provide a reasonably safe tool, that is, if the company and its representatives for which it was responsible, did everything that an ordinarily prudent person would have done under like circumstances and conditions, then the fact that a speck did fly off from this chisel, if it did, would not make the defendant liable, but if the defendant was negligent, if it or its employees authorized to act for it, as I have stated, did fail to exercise ordinary care to provide a reasonably safe tool, and as the result of that negligence on the part of the defendant, or its representatives, the injury happened, then the defendant would be liable, unless some of the affirmative defenses that I have mentioned are made out.

Now, in addition to the requirements that the defendant should exercise ordinary care, it is the duty of employees also to exercise ordinary care on their part. It was the duty of the plaintiff here in and about doing of this work, to exercise ordinary care to do whatever a reasonably prudent man would have done under like circumstances and conditions. If he failed to do this and was thereby guilty of negligence, and if that negligence was one of the contributing causes to the injury so that without that negligence on his part the accident would not have happened, then the plaintiff cannot recover, even though it should appear that the defendant also was negligent and that its negligence was also a contributing cause. Thus, if both parties were negligent and the

accident was caused by the joint result of the negligence of both parties, then the plaintiff cannot recover.

Now, in reference to the assumption of risk; there are two kinds of risks that should be considered; first, I will refer to what are called the ordinary risks. The ordinary risks in any business are those that exist in the business in spite of the exercise of ordinary care by the employer. Those are always assumed by the servant as a matter of course. If an injury and if an accident may take place in a line of business notwithstanding the exercise of ordinary care by the master, then that risk is one of the ordinary risks, and the employee assumes it.

Now, it is contended here by the defendant that even if this risk were not an ordinary risk, nevertheless it was assumed by the plaintiff. For the purpose of this case I may define an extraordinary risk as one that results from the negligence of the defendant by reason of its failure to exercise ordinary care to provide a reasonably safe tool.

Now, if defendant was negligent in failure to provide a reasonably safe chisel—furnished one that was defective, nevertheless the plaintiff by using that tool which was defective would assume the risk of so using it, provided the defect and the risk incident to the defect were known to him, or if they were so open and manifest that a person of his experience, his knowledge and his judgment would readily have observed them.

When you ome to the question of the assumption of an extraordinary risk you are to consider not only

the nature of the instrument but you are to consider the knowledge, the experience and the judgment of the person who is called upon to use it. The risk is not assumed—this extraordinary risk is not assumed if a person of his knowledge, experience and judgment would not have observed it, and if in fact it was not known to him. Otherwise the other rule would apply that I have stated.

Now, if you find for the plaintiff, you will come to the question of damages. The question of damages divides itself into two heads; those already incurred and those which will be incurred in the future. As to the past, you are to take into consideration any physical and and mental suffering that the plaintiff may have endured as the result of the injury, any discomfort and inconvenience resulting therefrom. He claims no loss of wages up to the present time, and as to the future he claims no wages —no compensation for loss of wages or earning capacity prior to his arriving at the age of twenty one years.

If the evidence makes it reasonably certain that the plaintiff will hereinafter suffer physical or mental pain as a result of this injury; discomfort or inconvenience, then your award of damages should make compensation for that, and to whatever extent it is reasonably certain that plaintiff's earning capacity in future will be impaired by reason of this injury you will make compensation by awarding at the present time such sum of money as will fairly

compensate him for that deprivation of his future earning capacity.

Now, in cases of this kind the law does not lay down any definite mathematical rule for estimating damages. They are left largely to the good sense and sound judgment of the jury. You are to bear in mind that the plaintiff, if he is entitled to recover, is entitled to recover just compensation, and his right of recovery is limited to just compensation, taking and bearing in mind the general rules that I have already stated.

You are the judges of all the questions of fact in the case, of the weight of the evidence and the credibility of the witnesses. You will pay no attention to any ruling that the court may have made in denying motions that have been made in this case. All that I have decided is that questions of fact are for you to determine and that you are responsible for a correct and righteous decision of those questions of fact.

In determining the credibility of the witnesses and the weight of the evidence you have the right to bear in mind not only the number of witnesses but the interest that they may have in the result of the case, the reasonableness of the story that they tell and any other circumstances and facts appearing in the evidence that, in the mind of a reasonable man, would have an effect in estimating the credibility due to any witness.

Now, the burden of proof is upon the plaintiff in this case to show to you by the fair preponderance of

the evidence, first, that the defendant was negligent and second, that that negligence was the proximate cause of his injury and, third, the extent of those injuries.

The burden is upon the defendant to prove that the plaintiff was guilty of contributory negligence or that he assumed any of the extraordinary risks such as I have already described.

By the greater weight of the evidence is meant the greater probability. If the evidence in favor of a certain proposition is equally balanced with the evidence against it, then the person holding the affirmative of that proposition, having the burden of proof, has not made out his case. But if the evidence preponderates in favor of the affirmative, that is, if the evidence in favor of the affirmative has a greater convincing force in your minds than the evidence in the negative, then the person holding the affirmative of that issue has made out his case—has established the point.

You have no right to find for the plaintiff for the reason that it is possible that he was injured by the negligence of the defendant.

In order for the plaintiff to make out a case it must appear by the weight of the evidence that the defendant was negligent and that its negligence was the proximate cause of the plaintiff's injury.

This case is submitted to you, gentlemen, to be decided without the effect of any sympathy or prejudice, as a cold question of fact to be determined solely from the evidence of the case.

You are to draw such conclusions, make such de-

ductions from the evidence in the case as you feel reasonable men should make from it.

In order to agree upon a verdict the concurrence of the entire twelve of your number is necessary.

The court will adjourn at half past four o'clock and if you have not agreed on a verdict at that time you may bring in a sealed verdict. That is, after agreeing on the verdict your foreman will sign it and it will be put in an envelope and sealed and retained by your foreman in his possession and you will then be in your seats tomorrow morning at 10 o'clock and the verdict will be opened and read. You may now retire.

MR. DORETY: Is it satisfactory to the court that any exceptions to the instructions may be taken later by stipulation of counsel?

THE COURT: If I have made any mistake I want an oportunity to correct it.

MR. DORETY: The defendant, may it please the Court, excepts to the instruction to the effect that there is a question of fact in the case as to whether the foreman was acting within the scope of his authority and that whether he was acting within the scope of his authority is for the jury to determine in this case.

THE COURT: Exception allowed. Have you any exceptions, Mr. McHugh?

MR. McHUGH: I think not.

Thereafter, on April 28, 1911, the jury returned a verdict in favor of the defendant.

Thereafter, and on January 8th, 1912, after argument on plaintiff's motion for a new trial, which motion was filed on April 30, 1911, and before the judgment was entered, the Court denied the motion and allowed plaintiff an exception.

Thereafter, on January 10th, 1912, James Boland having attained his majority in July, 1911, was substituted in person as plaintiff, for, and in place of the Guardian ad Litem.

Now, in the furtherance of justice and that right may be done, the plaintiff presents the foregoing as his Bill of Exceptions, and prays that the same may be settled and allowed, signed and certified by the Judge, as provided by law, and filed as a Bill of Exceptions.

HEBER McHUGH,
JOHN T. CASEY,
Attorneys for Plaintiff.

Order Settling Bill of Exceptions

Now on this 25th day of January, 1912, and less than 20 days after the disposition of the motion for a new trial in this cause, and within the time as extended by an order duly made on stipulation of the parties hereto for the settling and filing of the Bill of Exceptions in this cause, the above cause coming on for hearing on the application of the plaintiff to settle the Bill of Exceptions in said cause, plaintiff appearing by Heber McHugh, Esq., and defendant by F. G. Dorety, Esq., and it appearing to the Court that plaintiff's proposed Bill of Excep-

tions was duly served on the attorneys for the defendant within the time provided by law, and that no amendments have been suggested thereto, and that both parties consent to the signing and settling of the same, and that the time for settling the said Bill of Exceptions has not expired; and it further appearing to the Court that said Bill of Exceptions contains all the material facts occurring in the trial of said cause, together with the exceptions thereto, and the material matters and things occurring on the trial, except the exhibits introduced on the trial which are hereby made a part of said bill of exceptions and the clerk of this court is hereby ordered to attach the same thereto;

Thereupon, on motion of Heber McHugh, Esq., attorney for the plaintiff, it is hereby,

ORDERED, that said proposed Bill of Exceptions be and and the same is hereby settled as a true Bill of Exceptions in said cause, and that the same is hereby certified accordingly by the undersigned Judge of this court who presided at the trial of said cause, as a true, full and correct Bill of Exceptions, and the clerk of this court is hereby orderd to file the same as a record in said cause and transmit the same to the Honorable Circuit Court of Appeals for the Ninth Circuit.

GEORGE DONWORTH,
Judge.

(Filed Jan. 25, 1912.)

Assignment of Errors

Comes now the plaintiff, James Boland, and files the following Assignments of Error upon which he will rely upon his prosecution of his Writ of Error in the above entitled cause in the United States Circuit Court of Appeals for the Ninth Circuit, for the relief from the judgment rendered in said cause.

1.

The Honorable Circuit Court erred in admitting incompetent, irrelevant and immaterial evidence prejudicial to this plaintiff as follows:

The following evidence of Witness John Craig:

Q. In your experience with the Great Northern have you ever known of their furnishing section men with chisels like plaintiff's exhibit "A" or defendant's exhibit?

A. No sir; I never knew of that. I have ordered one like that, and they told me they did not furnish me with them (pointing to exhibit "A"), and this is not a chisel, Defendant's Exhibit No. 3; this is a stone cutter's point, to cut holes in a rock to lift with the derrick.

Q. Does the section foremen have the authority to go and buy a tool and charge it to the company?

A. No, sir; I never had any instruction to buy any tools, and never was allowed to.

Q. Does the section foremen of the Great Northern have authority to obtain tools in any way except from the supply train on requisition?

A. Not as I know of.

The following evidence of witness P. H. McFadden:

In the month of August, 1909, tools for the use on the sections, and one in which Boland was, were furnished by monthly supply cars; the section foreman makes a requisition monthly, and that order is filled at the store department and sent out in the supply car once a month, and in most cases it is accompanied by the assistant roadmaster; the tools that are furnished in that way pass inspection at the shops and the storehouses at each point they are furnished from, and also by the assistant roadmaster, and many times by myself if I go up with the car, and on the section; the regular shop inspections are made before they are shipped; the duty of the assistant roadmaster is to inspect the tools, and any defective tools shall be shipped in and new ones returned in their place; the rule is to make a trip of inspection and supply of that sort month; that is done by the assistant roadmaster.

Q. Is there any authority in any of the section foremen, under rules of the company, or did Pat Boland have any authority in the month of August 1909, to procure tools in any other way?

A. None whatever.

Q. Would you consider that the necessity of that to be an emergency calling for the procuring of a tool in some way, if no suitable tool were on hand?

A. No. The matter could have remained in abeyance for several days or weeks and, I might say months, until the proper tool was supplied, if it was

necessary to have that tool; the guard-rail would be held by guard-rail braces, which were supplied in that case; the guard-rail would perform its function practically as well without the bolts, temporarily; one object of the bolt is to hold the foot-guard in place, our new standard guard-rail is supplied with a metal foot-guard; the foot-guard is a piece of steel at the end of the guard-rail to protect the brakemen or anyone walking on the track from getting his foot in there, and these bolts go through the guard-rail to hold that foot-guard to its place.

Q. Will you state whether or not section foremen are required to make any regular inspections of the tools or any reports of the condition of the tools or anything of that sort?

A. They make requisitions for the tools, and in doing so they inspect them.

When the tools are supplied from the supply car inspection is made by the supplying party; the chisels marked plaintiff's exhibit "A" and defendant's exhibit No. 3, chisels of that kind are not furnished to section men of the Great Northern Railway Company; the chisel marked defendant's No. 2, is a track chisel; that is the regular chisel furnished to section men.

The following evidence of witness Patrick Boland:

Q. Do you know where the chisel that James ways carried them in my hand car.

A. Yes, sir.

Q. Where?

A. I gave it to him.

Q. Where did you get it?

A. I found it in the donkey engine.

Q. Where?

A. I found it on the scow.

Q. It was not a Great Northern chisel, was it?

A. No I do not think it was.

I had the regular standard rail chisel, a track chisel; I had track chisels like exhibit No. 2. I always carried them in my hand car

II.

The Honorable Circuit Court erred in overruling plaintiff's motion for a new trial.

WHEREFORE, plaintiff, plaintiff in error, prays that the judgment of the Honorable Circuit Court of the United States for the Western District of Washington, Western Division, be reversed and that directions be given that plaintiff may have a new trial of said cause and that full force and efficiency may inure to the plaintiff by reason of his prosecution of said cause.

HEBER McHUGH,
JOHN T. CASEY,
Attorneys for plaintiff.

(Filed Jun. 1, 1912.)

Order for Writ for Error

In the District Court for the Western District of Washington.

James Boland, Plaintiff, vs. Great Northern Railway Company, Defendant.	NI 1703-C.

On motion of John T. Casey, attorney for plaintiff, and on filing a petition for Writ of Error and assignment of errors

IT IS ORDERED that a writ of error be and the same is hereby allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit, the judgment heretofore entered herein, and that the amount of the bond on said writ of error is hereby fixed at $250.

IN WITNESS WHEREOF, the above order is granted and allowed this 25 day of June, 1912.

FRANK H. RUDKIN,
Judge.

(Filed Jun. 25, 1912.)

Bond on Writ of Error

Whereas in the above entitled cause, plaintiff, James Boland, has applied to the Honorable judge of said Court for the allowance of a writ of error to the Circuit Court of Appeals of the United States for the Ninth Circuit, and

Whereas said Court has fixed the security which plaintiff shall give in the sum of Two Hundred and Fifty Dollars,

NOW, THEREFORE, James Boland, as principal, and the other subscribers as sureties, acknowledge themselves held and firmly bound by these presents unto the defendant, Great Northern Railway Company, in the sum of Two Hundred and Fifty Dollars.

CONDITIONED that James Boland, appellant, shall prosecute his writ of error to effect, and if he fail to make his plea good, shall answer all costs.

The surety hereto further expressly covenants and agrees that in case of a breach of any condition of this bond, the above entitled Court may upon notice to the surety of not less than ten days, proceed summarily in said action to ascertain the amount which the said surety is bound to pay on account of the breach thereof and render judgment therefor against the surety and award execution therefor against the surety.

IN TESTIMONY WHEREOF witness the names of the parties hereto affixed by their duly authorized officers and attorneys this 25th day of June, 1912.

JAMES BOLAND,
By HEBER McHUGH, his atty.

(Seal of Surety Company.)

NATIONAL SURETY COMPANY,
By GEO. W. ALLEN,
Attorney-in-fact.

Approved July 1, 1912.

C. H. HANFORD,
Judge.

(Filed Jul. 1, 1912.)

Certificate

UNITED STATES OF AMERICA,
WESTERN
DISTRICT OF WASHINGTON.

I, A. W. ENGLE, Clerk of the United States District Court for the Western District of Washington, do hereby certify that the foregoing and attached papers are a true and correct copy of the record and proceedings in the case of JAMES BOLAND, plaintiff, vs. GREAT NORTHERN RAILWAY COMPANY, a corporation, defendant, as the same remain on file and of record in my office.

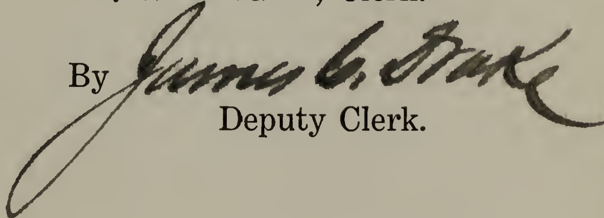
I further certify that I hereto attach and herewith transmit the original Citation and original Writ of Error issued in this cause,

I further certify the cost of preparing and certifying said foregoing record to be the sum of $56.30, which sum has been paid to me by the attorneys for the plaintiff in error.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said court at the city of Tacoma, in said District, this 29th day of July, A. D. 1912.

A. W. ENGLE, Clerk.

(SEAL)

By 
Deputy Clerk.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JAMES BOLAND,
Plaintiff in Error,
vs.
GREAT NORTHERN RAILWAY COMPANY,
Defendant in Error.

No. ~~1703~~ 2169

UPON WRIT OF ERROR FROM THE UNITED STATES DISTRICT COURT, FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

Brief of Plaintiff in Error

HEBER McHUGH,
JOHN T. CASEY,
Attorneys for Plaintiff in Error.

ROOT & CHRISTENSON, FOURTH & PIKE, SEATTLE

FILE

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JAMES BOLAND,
Plaintiff in Error,
vs.
GREAT NORTHERN RAILWAY COMPANY,
Defendant in Error.

No. 1703

UPON WRIT OF ERROR FROM THE UNITED STATES DISTRICT COURT, FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

Brief of Plaintiff in Error

STATEMENT OF FACTS.

This action was brought by James Boland to recover damages for the loss of his right eye, caused by a sliver of steel, from a defective cold chisel, fur-

nished him by the defendant's section foreman. Plaintiff was about 19 years of age, and merely a sectionman. He had no experience with tools, had never used a cold chisel before, and did not know that chips would fly if the chisel was too highly tempered. He knew nothing about temper in tools, and had never been told. The foreman always furnished the tools to the sectionman at that place, and gave plaintiff the chisel just a few minutes before the accident. Plaintiff was using the chisel in a proper manner, and a chip flew off and cut his eye. (Record, pp. 15, 16, 17, 18.) It was shown that the chisel was defective, in that, it was entirely too hard and brittle, and this condition resulted from its being too highly tempered. Several experts so testified for plaintiff, the chisel was introduced in evidence, and no evidence contradicting this was offered by the railway company. (Record, pp. 19, 20, 21.)

The jury returned a verdict in favor of the defendant, and from the judgment entered dismissing the action, this appeal is taken. (Record, p. 11.)

ASSIGNMENTS OF ERROR.

The following errors are assigned.

1.

The Honorable Circuit Court erred in admitting incompetent, irrelevant and immaterial evidence prejudicial to this plaintiff as follows:

The following evidence of Witness John Craig:

Q. In your experience with the Great Northern have you ever known of their furnishing section men with chisels like plaintiff's exhibit "A" or defendant's exhibit?

A. No, sir; I never knew of that. I have ordered one like that, and they told me they did not furnish me with them (pointing to exhibit "A"), and this is not a chisel, Defendant's Exhibit No. 3; this is a stone cutter's point, to cut holes in a rock to lift with the derrick.

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rule is to make a trip of inspection and supply of that sort monthly; that is done by the assistant roadmaster.

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A. No. The matter could have remained in abeyance for several days or weeks and, I might say months, until the proper tool was supplied, if it was necessary to have that tool; the guard-rail would be held by guard-rail braces, which were supplied in that case; the guard-rail would perform its function practically as well without the bolts, temporarily; one object of the bolt is to hold the foot-guard in place, our new standard guard-rail is supplied with a metal foot-guard; the foot-guard is a piece of steel at the end of the guard-rail to protect the brakemen or anyone walking on the track from getting his foot in there, and these bolts go through the guard-rail to hold that foot-guard to its place.

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Q. It was not a Great Northern chisel, was it?

A. No, I do not thnik it was.

I had the regular standard rail chisel, a track chisel; I had track chisels like exhibit No. 2. I always carried them in my hand car. (Record, pp. 43 to 45.)

II.

The Honorable Circuit Court erred in overruling plaintiff's motion for a new trial.

ARGUMENT AND AUTHORITIES.

Assignment Number 1.

Over the objection and exception of plaintiff in error the court admitted the evidence quoted under the foregoing assignment of error No. 1.

This evidence was clearly inadmissible, for the

reason that it permitted defendant to show that it had delegated the duty of furnishing the tool, to-wit: the cold chisel, to its foreman, and had forbidden him to secure one in any other way than by getting them from the supply car or by an order sent to the roadmaster.

The evidence and pleadings showed that the foreman always furnished the tools, and that on this day he gave the chisel to plaintiff in error. (Record, p. 4, lines 18 to 27; p. 5, lines 1 to 7.)

On examination, over the objection of plaintiff, the court allowed the foreman to testify that he did not get this chisel from the company but that he got it from a scow, near by, belonging to some one else. (Record, pp, 43 to 46.)

Also that he had other chisels in hand car. (Record, p. 29.)

It was shown that plaintiff did not know where the foreman got the chisel; that he did not know of any rule such as was testified to by the evidence objected to.

It appeared in the evidence that the section foreman was the stepfather of the plaintiff. (Record, p. 28.)

This Court can easily see the great prejudice that resulted to the plaintiff from this evidence. It was argued that there was no negligence on the part of the company because it had issued orders how the foreman

could get the tools and that, since the foreman did not follow these rules, but got the chisel where he had no right to get it, and since the foreman was the father of the plaintiff, that, therefore, it was not the negligence of the company but was a family affair, for which the company should not be held. It is unnecessary to state that this would defeat every case of like circumstances.

Our claim is that it was immaterial where the foreman got the chisel; that the foreman represented the master; was a vice-principal and not a fellow servant, and since the plaintiff did not know of any such rule or regulations attempting to limit the powers of the foreman, that the company was liable for the negligence of the foreman in getting and furnishing a defective tool, without regard to where the foreman secured the tool, and notwithstanding there was such a rule as testified to. Such a defense could be urged only against the suit of the foreman.

There was no such defense set out in the answer. (Record, pp. 7-10.) No allegation either of fellow servant, or of any rule such as was testified to.

In *Hermaneck v. Chicago & N. W. Ry. Co.,* 186 Fed. (C. C. A. 8th), the Court say:

"The evidence discloses that the railroad company kept a stock of tools, including claw bars, on hand at its shops in Clinton; also repaired and sharpened bars that were sent there; that it was the practice and duty of Barry, *defendant's section foreman,* when the tools

became worn and needed repairing, to send them to Clinton for repairs, and either like tools properly repaired, were sent to the foreman, or the defective and worn ones sent in were repaired and returned to him; that it would take two or three days to send the tools from the section upon which plaintiff was working to Clinton to have them repaired and returned. Such being the case, Barry, the section foreman, was a co-employe in respect to this particular matter. The duty to furnish the plaintiff with proper and suitable tools was a positive duty of defendant. Barry, the section foreman, was the employe to whom the defendant had intrusted the duty of seeing when the tools upon his section needed repairing and the duty of having them, when worn and needing repair, sent to defendant's shops for that purpose; and, as the duty of furnishing suitable and safe tools was a positive duty imposed on the defendant, it having delegated that duty to Barry, he was not in that respect, a co-employee (plaintiff) defendant. *Hough v. Ry.,* 100 U. S. 213; *N. P. Ry. v. Peterson,* 163 U. S. 346; *Homestake Mining Co. v. Fullerton,* 69 Fed. 923 (C. C. A.)''

Compare the evidence of McFadden, the roadmaster, with the above, and the case at bar is parallel with the case cited.

In the above cited case, the lower court directed a verdict for the defendant. The Circuit Court of Appeals reversed that judgment. In so doing, it was declared, *as a question of law,* that the section foreman was a vice-principal.

In *Port Blakely Mill Co. v. Garrett,* 97 Fed. 537 (9th C. C. A.), it is said:

''Stakes which fit in sockets on the side of a flat car designed for transportation of lumber are appliances necessary for the proper equipment of the car, and the railroad company is not relieved from liability

for personal injury sustained by an employe by reason of the breaking of such stakes on a loaded car, where they were defective and insufficient in number, by showing that they were made and supplied by a co-servant of the person injured.''

Also in *Great Northern Ry. Co. v. McLaughlin,* 70 Fed. 669 (9th C. C. A.), we find the following: In the statement of facts it is said:

''There was some conflict as to whether Johnson, the foreman, could hire and discharge men, and as to whether the injury was caused by the defective skid or by the negligence of the workman in irregularly pushing up the rails on the skids.'' (We might remark, that in the case at bar, there was *no conflict* as to the foreman being authorized to hire and discharge all the men on his section and as to him alone furnishing all the tools to his men).

''The contention of the counsel that because McLaughlin was employed to help load and unload the cars it was his duty and the duty of his fellow servants, to select the skids to be used for that purpose, and that the railroad company had performed its duty when it placed proper skids in the yard that might have been selected for that purpose, ignores some of the conditions which the testimony tended to establish, and for this reason should not be sustained. Let us suppose, for purpose of illustrating the principle contended for by counsel, and embodied in the third instruction heretofore referred to, that the master was an individual, instead of a railroad corporation, it would of course follow, from the argument of counsel, that if the individual master had himself selected the skids, the tools and appliances with which his workmen were to load and unload cars, and they were defective and dangerous, and known to be unsafe by him, and the condition of the skids were wholly unknown to the employe, who was injured by their use, this employe could not recover because, in the line of the general duty of the employe, he might have been called to select the skids himself. Is this not going at least

one step too far? (p. 673). * * * It was the duty of the railroad company to use ordinary care in the selection of suitable skids and appliances, and to provide a reasonably safe place for the laborers to work in unloading its cars. * * * It matters not to the employe by whom that safety is secured or the reasonable precautions taken.''

In this case, the railway's counsel requested the court to charge that if the jury found that the foreman had the power to hire and discharge the men and to superintend them in their work, this would not constitute him a vice-principal or representative of the company, etc.? The refusal of the Court to give such instruction was held not to be error.

The evidence objected to violates the elementary rule laid down in both Federal and State Courts, as follows:

''It is the duty of the master to furnish a servant with reasonably safe appliances with which to work * * * *which duty cannot be delegated* by him so as to relieve him of liability for injuries resulting from its violation.''

Electric Company v. Clark, 114 Pacific —.

Hough v. Co., 100 U. S. 216.

Neely v. Co. (Okla.), 64 L. R. A. 152.

Also:

''It is negligence of the master for the section foreman to furnish section men a defective maul'.'

Guthrie v. Co., II Lea (Tenn.), 372.

In *Telander v. Sunlin,* 44 Fed. 564, it is held that

where the master does not furnish the necessary tools, that the foreman may borrow them, and if he borrows defective tools, the master is liable, if damages follow their use.

In *Garrett v. Port Blakeley Co.*, 97 Fed. 573 (9th), this Court held the master liable for injury from defective stakes in a lumber car, although they were furnished and made by a fellow-servant.

In *Mining Co. v. Muset*, 114 Fed. 66 (9th):

> "The master owes a positive duty to its employed —the duty of affording them safe place to work in and safe tools to work with. That duty was necessarily delegated to a representative—an individual who for that purpose stood in the corporation's place."

We had the instructions of the court incorporated in the record so this court could see that the trial court did not cure the error and prejudice by his charge. (Record, pp. 29 to 40.)

Assignment Number 2.

If the evidence objected to and considered in the foregoing argument was improperly admitted, and should have been excluded, then there was no evidence to sustain the verdict. The evidence was uncontradicted as to the power of the foreman, as to the grade of plaintiff, of the defective and dangerous character of the chisel. There was no evidence on the part of the defendant but that which was clearly improper and prejudicial.

From the foregoing, it clearly appears that the judgment appealed from should be set aside and a new trial granted.

Respectfully submitted,

HEBER McHUGH,

JOHN T. CASEY,

Attorneys for Plaintiff in Error.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JAMES BOLAND,
Plaintiff in Error,

vs.

GREAT NORTHERN RAILWAY COMPANY,
Defendant in Error.

No. ~~1703.~~ 2169

Brief of Defendant in Error

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ADDITIONAL STATEMENT OF FACTS.

The statement of facts in the brief of the plaintiff in error is a fair statement of the allegations of the plaintiff's complaint, but it evidently does not purport to be, and certaintly is not, a statement of the admitted or undisputed facts in the case.

The plaintiff's allegations, in brief, are that while working as a section laborer for the defendant railway company, the defendant furnished to the

plaintiff a hammer and a defective cold chisel, and that while using them in the proper manner a chip flew from the head of the chisel and put out the plaintiff's eye.

The defendant's admissions in brief are that the plaintiff was working for the defendant upon the occasion in question, and that he was using a hammer and a cold chisel and that the defendant had furnished him the hammer. But it was denied that the defendant had furnished the chisel or that it was necessary or proper for the plaintiff to use that chisel or any chisel in his work.

The allegations and the admissions and denials above referred to are in the pleadings. Coming now to the evidence, the wrong complained of was that one employe of defendant handed another employe a defective chisel and told him to use it. In order to bind the defendant company by this action, plaintiff offered evidence that the employe who had furnished the tool was called a section foreman and that he had power to hire and discharge men.

The defendant had denied that the employe referred to had furnished the chisel, and if he did furnish it, denied that he had authority to do so. The defendant had sought to show by cross-examina-

tion of plaintiff and his witnesses that the chisel had been procured from an abandoned donkey engine on some adjoining property, and either that the plaintiff had procured it himself or had seen the section foreman go over there and get it. Defendant further offered evidence that no section foreman had authority to procure a tool in any such way as that and sought to show that the plaintiff was the son of the section foreman; that he had himself run the section in his father's absence and that he knew of this limitation upon the foreman's authority as indicated by custom and precedent in the past with which he was perfectly familiar.

ISSUES BEFORE THIS COURT.

After the trial was over and the verdict and judgment had been rendered, it seems to have occurred to plaintiff to question the sufficiency of our proof of the limitations of the foreman's authority, or of the plaintiff's knowledge of such limitations, and the idea seems to have occurred to him that we had shown or admitted a real or apparent authority in the section foreman to furnish this particular tool. He seems to have conceived the idea that there was no question for the jury regarding the extent of the foreman's authority.

That this was entirely an afterthought on counsel's part, however, is indicated by the fact that he did not ask the court to strike out the testimony on this subject, did not ask the court to withdraw that issue from the jury, and took no exception to the instructions of the court by which the issue was left to the jury.

It would seem, therefore, that he was precluded from questioning in this court the views of the trial court upon the law of master and servant, or of express or implied authority and limitations thereon. However, in searching the record, counsel seems to have discovered that certain questions were asked bearing upon the subject of the express or apparent authority of the section foreman, and that these questions had been objected to by counsel as immaterial, and the objections overruled, and the idea occurred to counsel that he could use these rulings as a basis upon which to present to this court questions of substantive law which he desired to raise.

It seems so clear to our minds that the questions which counsel seek to present in their brief are not raised by this record, that we shall not attempt to discuss the substantive law which should govern the instructions of the court in a case of this sort. The

only questions raised here are whether at the time certain questions were asked, the record was such that the court should have ruled that any answer to them would be necessarily immaterial and should therefore have sustained counsel's objections to the questions. There is no issue here as to whether the answers to these questions were, or might have seemed, material at the time, for there were no motions to strike the answers. There is no question here as to whether answers which might have seemed material at the time, proved later to be immaterial by reason of our failure to connect them up with the case, for there was no motion at the end to strike such evidence and no request for an instruction that the jury should disregard it. We repeat that the only questions raised are whether the court at the time the questions were asked could, from the state of the record at that time, say that any answers to the questions would necessarily be immaterial.

ARGUMENT.

The first matter to be considered, therefore, is the state of the record at the time the objections were made, first, as disclosed by the pleadings, and second, as shown by the evidence up to that time.

We consider, first, the issues as framed by the pleadings. It is alleged in paragraph IV of the complaint (Record p. 4) that it was necessary for plaintitff to use a cold chisel, and that the cold chisel and other tools are furnished and kept in repair by the defendant. It is admitted in the answer, paragraph IV (Record p. 8), that the plaintiff was using a cold chisel and hammer and that defendant furnished the hammer, but every other allegation in paragraph IV, including the allegation that defendant furnished the chisel, is denied. It is alleged in paragraph V of the complaint (Record p. 4) and in paragraph VII (Record p. 5) that it was the duty of the defendant to furnish plaintiff with suitable cold chisels, and that it was necessary and proper for plaintiff to use a cold chisel. It is denied in paragraph VI of the answer (Record p. 8) that it was necessary or proper for plaintiff to use any chisel whatever, and also denied, under the

general denial of paragraph IV of the answer, that it was the duty of the defendant to furnish any chisel. It is alleged in paragraph VI of the complaint that the defendant furnished the chisel in question (Record p. 5). This is denied in paragraph V of the answer (Record p. 8).

It is further pleaded as an affirmative defense in the answer (Record pp. 9 and 10) that the risks and dangers were known to and assumed by plaintiff at and prior to the time of his injuries.

It will be observed that there was no allegation in the complaint, and therefore no specific denial in the answer, that the particular employe, named Patrick Boland, and called section foreman, had handed the chisel in question to the plaintiff. When this question arose, upon the hearing, the following occurred:

"THE COURT: Do you deny that the foreman furnished the tool in this case? That the foreman handed it to the plaintiff?

"MR. DORETY: Well, we put them at issue on that; we put them to proof of it." (Record p. 23.)

There are many lines of evidence which might be properly offered by the defendant under the issues framed as above. The defendant would clearly be entitled to show, for example, that the plaintiff

had procured this tool of his own motion from some source unknown to the defendant, and that there was no emergency from which any authority to procure a tool in that way could be implied. It is elementary that there is no ground upon which an employer can be held liable where the servant was injured while using for the purposes of his work some material substance which happened to be in a convenient position, but which was not the property of the employer and which was not used by his authority.

LaBatt on Master and Servant, Section 168.

Channon vs. Sanford Co., 70 Conn. 573, 40 Atl. 462, 41 L. R. A. 200.

Yearsley vs. Sunset Telephone & Telegraph Co., 110 Cal. 236, 42 Pac. 638.

We would be equally entitled to show that the chisel had been handed to the plaintiff by some fellow employe, but that the latter was not authorized to furnish tools, and that the furnishing of this chisel was not within the scope of his authority.

LaBatt on Master and Servant, Vol. 2, p. 1659.

12 *Am. & Eng. Enc. of L.* 952.

26 *Cyc.,* p. 1329.

McGee vs. Cuyler (Maryland), 75 Atl. 970.

Even though the employe who furnished the tool is a foreman, in charge of the job, it does not necessarily follow that he has authority to furnish tools or materials, and it is proper to show that such an act is beyond his authority.

> *Choctaw Electric Co. vs. Clark* (Okla.), 114 Pac. 730.
>
> *Telander vs. Sunlin,* 44 Fed. 564.

And finally it has been held that in a case almost identical with the facts of the present case, not only that the limitations in this respect upon the foreman's authority may be shown, but that upon facts similar to the facts in this record, the court should have directed a verdict in favor of the defendant. In the case referred to, an apparatus had been made by a foreman on the job, who employed his own men and superintended the job on which he was working. As in the case at bar, tools were furnished through a superior officer to the foreman and the men. The apparatus in question was then adopted by another foreman having similar rank, and used by him contrary to the express orders of the superior. It was not shown that the men under him had any knowledge of these orders, but the court held that the evidence failed to show that the apparatus in question was furnished by the

master; and directed a verdict for the defendant.

> *Callaway vs. Allen* (C. C. A., 7th Cir.), 64 Fed. 297.

Under these decisions we would clearly be entitled to show that the employe who handed the chisel to plaintiff, although a foreman having certain duties with respect to tools, was expressly limited in that authority, and was not authorized to procure a tool in the manner shown here, and that this limitation of authority was known to plaintiff. In brief, the defendant was entitled, under the issues made by the pleadings, to introduce evidence tending to show that the instrumentality which caused the plaintiff's injury was one not furnished by defendant or under its authority; that it did not belong to defendant, and that it was adopted for use by the plaintiff with full knowledge of these facts.

In considering the questions against which objections were overruled at the trial, it was the right and duty of the court to consider whether any answer which might be given responsive to the question could materially tend to support any one or more of the facts upon which the defense might rest as above stated. At the time the objections were presented and rulings made, the court could not

know what answer would be given, nor could it anticipate the respective answers which were given. Whether the answers which were given were in fact material is not the question which was presented to the trial court, for the record shows no motion to strike, and it is elementary that immateriality in an answer cannot be urged as error where the question ruled upon was proper, and might call forth a material answer. In order to take advantage of an objection to the question under such circumstances, the party must follow it up with a motion to strike the immaterial answer.

Gould vs. Day, 94 U. S. 405, 24 L. Ed. 232.

N. P. Ry. Co. vs. Charles, 51 Fed. 562, at 571.

Union Ins. Co. vs. Hall, 90 Minn. 252, 95 N. W. 1112.

Chicago City Ry. Co. vs. O'Donnell, 114 Ill. App. 359.

Western Union Tel. Co. vs. Bowman, 141 Ala. 175, 37 Southern 493.

Moreover, it is not error to admit testimony which at the end of the case turns out to be immaterial by reason of some failure to connect it up, or to furnish some necessary link in the chain. When such evidence has been admitted by the court over objection, upon the assumption that it may be later

connected up, and become material, and the party offering the evidence later fails to furnish the necessary connection, the objecting party cannot rely upon the objection originally made, but must make a motion at the end of the case to strike out the immaterial evidence, or ask the court to instruct the jury to disregard the same. The attention of the court must be called at the end of the case to the fact that the evidence offered has become immaterial.

Walker vs. Lee, 51 Fla. 360, 40 Southern 881.

Wilson vs. Johnson, 51 Fla. 370, 41 Southern 395.

Hady vs. Brown, 151 Ind. 75, 49 N. E. 805.

We are now prepared to place ourselves in the position of the trial court at the time of the rulings, as to the issues framed by the pleadings, and as to the possible lines of testimony by which our contentions might have been supported. In order to understand the point of view of the trial court completely, however, it must be borne in mind that all of the direct witnesses to this accident were hostile witnesses, the plaintiff himself, the man working with him, who had left our employment and was produced as a witness by the plaintiff, and the section foreman, who had also left our employment and

was the step-father of the plaintiff. We were necessarily groping somewhat in the dark. We could show by our own witnesses the actual authority of the section foreman, the express limitations upon his authority, and the scope of his duties, but to show the plaintiff's knowledge of these limitations, and the plaintiff's knowledge of the source from which the chisel had come, and the source from which it in fact came, we had to depend upon the hostile witnesses above named, one of whom, Patrick Boland himself, was not produced until the plaintiff's rebuttal, and after the court had made most of the rulings criticized here. We had already sought, on cross-examination of the plaintiff and his witnesses, to show that the plaintiff had either procured the chisel himself, or had seen the section foreman go over and get it (Record pp. 17, 19), and that his past experience had been such as to make him familiar with the scope of the restriction upon the authority of the section foreman (Record p. 17). The scope of our denials was very broad and the particular line to be presented was somewhat indefinite. Under these circumstances and with the issues in this condition, the rulings criticized here were made, and it now becomes necessary to examine those rulings more closely.

THE ASSIGNMENTS OF ERROR.

The assignments of error are not numbered, nor separately stated, but a considerable amount of testimony, including a number of different questions and answers, and a number of different objections and rulings of the court, are grouped together as assignment No. 1, so that it is somewhat difficult to separate them and to discuss them intelligently. However, we shall attempt to take up the questions or statements of evidence which were objected to, one by one, and to state briefly the theory upon which the evidence was offered. We can then proceed to discuss the propriety of the court's various rulings with more clearness.

The first question objected to (Record p. 22) is as to whether the Great Northern ever furnished the sort of a chisel that plaintiff claimed to have been injured by. We had denied that either the Great Northern or any of its employes ever furnished that particular tool. It was surely proper to show that in the ordinary course of events neither the Great Northern nor any of its employes had any such tools to furnish, as tending to show that the section foreman had not furnished this one. It

would have been proper to show that such a tool had not been invented or manufactured at that time, or that there was no such tool in the county and that therefore the statement that the foreman had furnished that particular tool to plaintiff must be untrue. On the same reasoning our proof that neither the Great Northern nor any of its employes were in possession of such tools was proper, it being not yet developed that the foreman claimed that he had obtained the tool from an outside source.

The next question is, "Does the section foreman have authority to go and buy a tool and charge it to the company?" (Record p. 23). As it later turned out, no claim was made that the section foreman had bought this tool, so that for this reason the question would become immaterial, except as tending to fix one of the limits of the section foreman's authority. The question would have been material, however, if followed up by a showing that the section foreman had in fact bought the tool, so that the court's ruling at the time was correct. Moreover, inasmuch as no issue developed as to whether the tool had been purchased or not, the error, if any, was not prejudicial.

The next question is, "Does the section foreman of the Great Northern have authority to obtain

tools in any way except from the supply train by requisition?" This question was proper as determining the express limits of the section foreman's authority. We had made no admissions as to what a section foreman was, nor what his authorities were. The witness who was being questioned had stated that he made requisitions for tools and got them from the supply car, but that would not prevent our showing that he had no authority regarding tools, and perhaps showing by some other witness that, as a matter of fact, he did not even have authority to get them from the supply train. The question of what sort of an employe a section foreman was, what his duties were, and what authority he had, if any, and in what respects he represented the employer, were still open under the pleadings. For all that the court or jury knew, or for all that any admissions on our part had established, the section foreman might be simply a bookkeeper, a labor agent, or a messenger boy employed to carry tools from the tool car to the section handcar, it being testified to by the plaintiff simply that a man named the section foreman had given him a tool. It is surely proper for us to show who and what a section foreman is and what his authority is, and even if we had, at this time, admitted that he was

in charge of the work and furnished the tools, it was still open to us to show an express limitation upon his authority, and to follow that with proof that the plaintiff knew of the express limitation and knew that it was being violated when the section foreman handed him the chisel in question. We did not know ourselves at this time, and certainly the court could not know how much proof we might be able to get from the hostile witnesses on this point.

The above objections are directed against the evidence of witness John Craig. Assignment of errors No. 1, however, setting up the above objections, then proceeds to set forth a paragraph of testimony and three questions and answers of the witness P. H. McFadden. The paragraph sets forth the system by which tools are furnished by the Great Northern, and shows, briefly, what the section foreman has to do with the matter. Neither side had yet been committed to the position that the section foreman had secured the chisel from an outside source, and the allegation of the plaintiff was simply that the defendant company had furnished it through its agent. For all that the court knew, or for all that we could tell ourselves at that time, it might develop from the testimony of the section

foreman that the chisel had come from the regular tool supply of the company. Under these circumstances the company would not be an insurer of the tool, but we would be held simply to its reasonable selection and maintenance and to a reasonably frequent inspection, and it was proper to anticipate such proof by showing what the system used by the Great Northern Railway Company was. It does not appear from the record what questions were asked in order to bring forth this testimony, and therefore it cannot be determined here exactly what the rulings of the court were. Presumably the information was in answer to a question of what the authority and duties of the section foreman were as to tools, and such a question would be proper under the issues here.

The next objection refers to the question, "Is there any authority in any of the section foremen, under the rules of the company, or did Pat Boland have any authority, in the month of August, 1909, to procure tools in any other way?" (Record p. 25.)

This is practically the same question that was asked of the witness Craig, and it has already been discussed.

The next question is, "Would you consider the necessity of that (putting in a guard rail) to be an emergency calling for the procuring of a tool in some way, if no suitable tool were on hand?" It might be contended that the circumstances related by the plaintiff had shown such an emergency as might create an implied authority in an employe in charge of the work to procure tools to meet the emergency in other than the usual manner, and the answer which was given would be material in rebutting this assumption. If it be argued that no such contention or assumption was in fact made, it would follow that the error, if any, was therefore not prejudicial.

The next question is "will you state whether or not the section foremen are required to make any inspection of the tools or report the condition of the tools, or anything of that sort?" (Record p. 26). There being an issue in the case as to whether the section foreman had authority to furnish the cold chisel in question, any evidence tending to show what sort of an employe he was, what his duties were and what, if anything, he had to do with tools would be material. For all that the court would know at this time, the question might have been followed up by a showing that this duty of inspection

devolved upon another employe, or that perhaps the plaintiff himself should have made it. The question might have been connected up with the case and have become material in a number of different ways. and it was not for the court to say that no answer which might be given to that question could possibly become material under any theory. If at the close of the case the plaintiff found that the answer was not material, or had not been properly connected up, he should have called the attention of the court to the matter at that time by a motion to strike. He cannot contend now that the ruling upon the question made at the time was improper.

Next comes a paragraph, not stated in the form of question and answer, to the effect that cold chisels of the sort which the plaintiff was using are not furnished to sectionmen of the Great Northern Railway Company, but that regular track chisels of a different character are furnished. (Record p. 27.) This is practically the information given in answer to the first question objected to, and has already been discussed, tending to show that the chisel could not have been furnished by a Great Northern section foreman as the plaintiff claimed.

Finally, and still under assignment of error No. 1, is a series of five questions put to the witness

Patrick Boland, who, as the record shows, was the step father of the plaintiff, and no longer in the service of the defendant, and who had first been called as a witness by the plaintiff himself, and was therefore presumably in the nature of a hostile witness.

The first question is as to where the chisel the plaintiff was using came from. It having been denied that the defendant had furnished it to him, it was surely proper to ask any witness where it came from. The plaintiff might have borrowed it or purchased it himself.

The witness having answered that he himself had given the chisel to the plaintiff, the next questions are as to where he had gotten it and whether it was a Great Northern chisel. (Record p. 28.) These questions were proper for two reasons. In the first place it having been denied by us that Patrick Boland had handed the chisel to the plaintiff, and he being a hostile witness, it was proper for us to cross-examine him as to his statement that he had handed the chisel to the witness, by making him admit that this was not a Great Northern chisel, and that he had proper chisels on hand which were furnished by the Great Northern; this fact tending to establish the improbability that he had handed the

chisel to the plaintiff as stated. In the second place, it having been established that the sort of employe called a section foreman had nothing to do with tools, except to make requisitions for them, and that aside from that, he had no more right to go out and procure a tool for another employe than a ticket agent or a brakeman would have, it was proper to show that the tool in question had not been procured by him in any way that would bring it within the scope of his authority, and finally, the evidence given by this witness might yet be followed up by a showing that the plaintiff knew how the foreman had procured the chisel and knew that he was not acting within his authority in doing so, and that his act was not the act of the defendant. If it be assumed that this last showing was necessary to connect up the testimony to make it material, the fact remains that it was proper to allow the questions asked as one of the necessary links in the chain. If they were not properly connected up afterwards, it was the duty of plaintiff to call the matter to the court's attention, and ask that this evidence be stricken or the jury instructed to disregard it.

The above is a statement of the various alleged errors which have been collected by plaintiff in his assignment No. 1. Assignment No. 2 is simply

directed to the ruling of the court in refusing a new trial, and the correctness of this ruling depends entirely upon whether any errors had been shown under assignment No. 1; consequently the discussion already set forth covers both assignments.

The argument of the plaintiff in error seems to assume that it was admitted by us, or established by him, in such a way that the court would take judicial notice of it, or that it would not be disputed, that a section foreman was a man employed to represent the company in furnishing tools, and that he furnished the tools in question, and that this act was necessarily the act of the company, and that therefore it was immaterial where he got the chisel since it was the defendant acting through him that furnished it. He argues that therefore we cannot invoke the fellow servant rule since the duty on the part of the master to see that the tools which we furnish are safe cannot be delegated, or in other words, that any one employed to furnish tools is necessarily a vice-principal.

The authorities cited by him support this contention, and we agree with him in every particular. The trouble with this argument is, that it first sets up a man of straw and then bravely knocks it down. It completely demolishes the theory which it at-

tacks, but unfortunately for the plaintiff that is not the theory upon which the evidence was admitted. We did not invoke the fellow servant rule in any way. We did not claim that this was the act of a co-employe or of any employe. What we were entitled to claim under the issues, and entitled to try to prove was that the man who went and got that chisel was not employed for that purpose any more than a stranger or a rate clerk or an employment agent would be, and that in getting the chisel he was doing something he was not hired to do, and had no authority to do.

Here is the fallacy in the plaintiff's argument when applied to the admission of evidence. He assumes that we had admitted, or that the court must take judicial notice that Patrick Boland was in charge of the work and had power to employ or discharge men and to furnish all tools, and that therefore the only material issue in this case was as to whether he had actually handed to plaintiff the particular tool in question. The truth is that we had not only not admitted these things, but we had denied them, as we have already shown by reference to the pleadings.

As already pointed out the record raises no question as to the correctness of the court's instruc-

tions. It raises no question as to whether any of the answers given were immaterial, for there was no motion to strike an answer. It raises no question as to whether any of the questions asked, afterwards became immaterial by reason of our failure to connect them up with other necessary links in the chain, for the question was not called to the attention of the court at the close of the case, and there was no motion to strike. The sole and only questions presented to the trial court were whether or not the questions objected to might fairly be expected to call forth any material testimony. If so, the objections to the questions were properly overruled and objections to the answers could only be raised by motions which were not made.

The questions of substantive law discussed in the plaintiff's brief are therefore not pertinent to this record, and there is no showing of error on the part of the trial court.

Respectfully submitted,

F. V. BROWN,

F. G. DORETY,

Attorneys for Defendant in Error.

No. 2177

United States
Circuit Court of Appeals
For the Ninth Circuit.

C. M. SUMMERS,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the District of Alaska, Division No. 1.

FILED
SEP 3 0 1912

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 2177

United States

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INDEX OF PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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[Praecipe for Record.]

SHACKLEFORD & BAYLESS,
Attorneys and Counsellors at Law,
Juneau, Alaska.

July 29, 1912.

Clerk District Court,
Division No. 1,
Juneau, Alaska.

Dear Sir:

Please prepare the transcript of the record for appeal in the case of the United States vs. C. M. Summers, Cause No. 821–B in the District Court, and certify the following papers, to wit:

1. Copy of the indictment;
2. Copy bail bond;
3. Copy demurrer;
4. Copy order overruling demurrer Jan. 8th, 1912;
5. Copy order rehearing demurrer and overruling the same May 18, 1912;
6. Copy election not to plead but to stand on the demurrer;
7. Judgment on the demurrer and sentence;
8. Appeal papers:
    a. Petition for appeal;
    b. Order allowing appeal;
    c. Writ of error;
    d. Citation;
    e. Assignment of errors;
    f. ~~Order fixing bail;~~
    g. Bail bond;
    h. Order extending time for filing transcript to August 15, 1912.

When so prepared you will kindly transmit this record to the Clerk of the United States Circuit Court of Appeals at San Francisco.

Very truly yours,
LEWIS P. SHACKLEFORD.
By W. S. BAYLESS.

[Endorsed]: Filed July 29, 1912. E. W. Pettit, Clerk. By ————, Deputy. [1*]

District Court for the District of Alaska, Division Number One, at Juneau.

THE UNITED STATES OF AMERICA

vs.

C. M. SUMMERS and STEWART G. HOLT.

Indictment.

At the regular term of the District Court of the United States of America, within and for the District of Alaska, Division Number One thereof, in the year of our Lord one thousand nine hundred and twelve, begun and held at Juneau, in said District and Division, beginning the 3d day of January, A. D. 1912.

The Grand Jurors of the United States of America, selected, empaneled, sworn, and charged within and for the District of Alaska, accuse C. M. Summers and Stewart G. Holt by this indictment as follows:

COUNT ONE.

The Grand Jurors aforesaid, upon their oaths

*Page-number appearing at foot of page of original certified Record.

aforesaid, do present that heretofore, to wit, on the nineteenth day of January, A. D. 1910, in the town of Juneau, in Division Number One, District of Alaska, and within the jurisdiction of this court, said C. M. Summers and said Stewart G. Holt, he, the said C. M. Summers, being then and there the President, and he, the said Stewart G. Holt, being then and there the Cashier, of a certain National Banking Association, then and there known and [2] designated as First National Bank of Juneau, which said association theretofore had been duly organized and established and was then existing and doing business at the said town of Juneau, in the Division and District aforesaid, under the laws of the United States pertaining to national banking associations, did then and there wilfully, unlawfully, fraudulently and wrongfully make in a certain book then and there belonging to and in use by the said association in transacting its said banking business and in keeping its accounts and then and there designated and known as "Journal D," on page 869 thereof, a certain false entry to the effect that on that date the sum of Six Thousand Eight Hundred and Sixty-four Dollars and Forty-five cents ($6,864.45) was transferred by said association to the Assistant United States Treasurer at San Francisco, California, out of the funds and deposits with said association to the credit of the Treasurer of the United States, which entry was made as a debit item of a certain account known and designated as "Treasurer United States," and which en-

try was then and there in words and figures as follows, to wit:

"Treas. U. S.

Transfer Excess Deposits to Asst.

Treas. U. S. at San Francisco....6,864.45"

and which said entry so as aforesaid made in said book then and there purporting to show and did in substance and effect indicate and declare that the sum of Six Thousand Eight Hundred and Sixty-four Dollars and Forty-five Cents ($6,864.45) was then and there transferred and paid over by the said First National Bank of Juneau to the Assistant United States Treasurer at San Francisco, California, out of the funds on deposit in and with said association to the credit of the Treasurer of the United States, and that at the close of [3] business hours on said day there remained in said First National Bank of Juneau to the credit of the Treasurer of the United States and the various disbursing officers of the United States no more than One Hundred and Twenty-five Thousand Dollars ($125,000);

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said entry so made as aforesaid was then and there wholly false in this, that neither said sum of Six Thousand Eight Hundred and Sixty-four Dollars and Forty-five Cents ($6,864.45) nor any portion thereof had at that time been nor was at that time so transferred by the said association or any of its officers to the said Assistant United States Treasurer at San Francisco, California, but that, on the contrary, the said sum last above mentioned still remained on deposit

in said First National Bank of Juneau to the credit of the Treasurer of the United States, and at such time there remained on deposit with said association to the credit of the Treasurer of the United States and the various disbursing officers of the United States a sum greater than One Hundred and Twenty-five Thousand Dollars ($125,000), to wit, the sum of One Hundred and Seventy-one Thousand Five Hundred and Fourteen Dollars and Fifty-six Cents ($171,514.56), as he, the said C. M. Summers, President, and he, the said Stewart G. Holt, Cashier, as aforesaid, then and there, when so making said entry, well knew, and the said false entry was then and there so made as aforesaid with the intent then and there on the part of him, the said C. M. Summers, and him, the said Stewart G. Holt, to injure and defraud said association and certain persons to the Grand Jury unknown, and to deceive any officer of the said association [4] and the Comptroller of the Currency and any agent appointed by said Comptroller of the Currency to examine the affairs of said association, contrary to the form of the Statutes in such case made and provided, and against the peace and dignity of the United States.

COUNT TWO.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that heretofore, to wit, on the 28th day of January, A. D. 1910, in the town of Juneau, in Division Number One, District of Alaska, and within the jurisdiction of this court, said C. M. Summers and said Stewart G. Holt, he, the said C. M. Summers, being then and there

the President, and he, the said Stewart G. Holt, being then and there the Cashier, of a certain National Banking Association then and there known and designated as First National Bank of Juneau, which said association theretofore had been duly organized and established and was then existing and doing business at the said town of Juneau, in the Division and District aforesaid, under the laws of the United States pertaining to national banking associations, did then and there wilfully, unlawfully, fraudulently and wrongfully make in a certain book then and there belonging to and in use by the said association in transacting its said banking business and in keeping its accounts and then and there designated and known as "Journal D," on page 873 thereof, a certain false entry to the effect that on that date the sum of Forty-eight Thousand and Forty-five Dollars and Seventy-five Cents ($48,045.75) was transferred by said association to the Assistant United States Treasurer [5] at San Francisco, California, out of the funds and deposits with said association to the credit of the Treasurer of the United States, which entry was made as a debit item of a certain account known and designated as "Treasurer United States," and which entry was then and there in words and figures as follows, to wit:

"Treas. U. S.

Transfer Excess Deposits to Asst.

Treas. U. S. at San Francisco...48,045.75"

and which said entry so as aforesaid made in said book then and there purporting to show, and did

in substance and effect indicate and declare, that the sum of Forty-eight Thousand and Forty-five Dollars and Seventy-five Cents ($48,045.75) was then and there transferred and paid over by the said First National Bank of Juneau to the Assistant United States Treasurer at San Francisco, California, out of the funds on deposit in and with said association to the credit of the Treasurer of the United States, and that at the close of business hours on said day there remained in said First National Bank of Juneau to the credit of the Treasurer of the United States and the various disbursing officers of the United States no more than One Hundred and Twenty-five Thousand and Four Hundred Dollars ($125,400);

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said entry so made as aforesaid was then and there wholly false in this, that neither said sum of Forty-eight Thousand and Forty-five Dollars and Seventy-five Cents ($48,045.75), nor any **[6]** portion thereof, had at that time been or was at that time so transferred by the said association or any of its officers to the said Assistant United States Treasurer at San Francisco, California, but that, on the contrary, the said sum last above mentioned still remained on deposit in said First National Bank of Juneau to the credit of the Treasurer of the United States and at such time there remained on deposit with said association to the credit of the Treasurer of the United States and the various disbursing officers of the United States a sum greater than One Hun-

dred and Twenty-five Thousand and Four Hundred Dollars, ($125,400) to wit, the sum of One Hundred and Ninety-seven Thousand Four Hundred and Seventy-seven Dollars and Fourteen Cents ($197,-477.14), as he, the said C. M. Summers, President, and he, the said Stewart G. Holt, Cashier, as aforesaid, then and there when so making said entry well knew, and the said false entry was then and there so made as aforesaid with the intent then and there on the part of him, the said C. M. Summers, and him, the said Stewart G. Holt, to injure and defraud said association and certain persons to the Grand Jury unknown, and to deceive any officer of the said association and the Comptroller of the Currency and any agent appointed by said Comptroller of the Currency to examine the affairs of such association, contrary to the form of the Statutes in such case made and provided, and against the peace and dignity of the United States. **[7]**

COUNT THREE.

That the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that heretofore, to wit, on the 21st day of March, A. D. 1910, in the town of Juneau, in Division Number One, District of Alaska, and within the jurisdiction of this court, said C. M. Summers and said Steward G. Holt, he, the said C. M. Summers, being then and there the President, and he, the said Stewart G. Holt, being then and there the Cashier, of a certain national banking association then and there known and designated as First National Bank of Juneau, which said association theretofore had been duly organized and

established and was then existing and doing business at the said town of Juneau, in the Division and District aforesaid, under the laws of the United States pertaining to national banking associations, did then and there willfully, unlawfully, fraudulently and wrongfully make in a certain book then and there belonging to and in use by the said association in transacting its said banking business and in keeping its accounts and then and there designated and known as "Journal D," on page 903 thereof, a certain false entry to the effect that on that date the sum of Fifty-five Thousand Six Hundred and Eighty-six Dollars and Ninety Cents ($55,686.90) was transferred by said association to the Assistant United States Treasurer at San Francisco, California, out of the funds and deposits with said association to the credit of the Treasurer of the United States, which [8] entry was made as a debit item of a certain account known and designated as "Treasurer United States," and which entry was then and there in words and figures as follows, to wit:

"Treas. U. S.

Transfer Excess Deposits to Asst.

Treas. U. S. at San Francisco...55,686.90"

and which said entry so as aforesaid made in said book then and there purporting to show and did in substance and effect indicate and declare that the sum of Fifty-five Thousand Six Hundred and Eighty-six Dollars and Ninety Cents ($55,686.90) was then and there transferred and paid over by the said First National Bank of Juneau to the As-

sistant United States Treasurer at San Francisco, California, out of the funds on deposit in and with said association to the credit of the Treasurer of the United States, and that at the close of business hours on said day there remained in said First National Bank of Juneau to the credit of the Treasurer of the United States no more than One Hundred and Fifty Thousand Dollars ($150,000);

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said entry so made as aforesaid was then and there wholly false in this, that neither said sum of Fifty-five Thousand Six Hundred and Eighty-six Dollars and Ninety Cents ($55,686.90) nor any portion thereof had at that time been nor was at that time so transferred by the said association or [9] any of its officers to the said Assistant United States Treasurer at San Francisco, California, but that, on the contrary, the said sum last above mentioned still remained on deposit in said First National Bank of Juneau to the credit of the Treasurer of the United States, and at such time there remained on deposit with said association to the credit of the Treasurer of the United States and the various disbursing officers of the United States a sum greater than One Hundred and Fifty Thousand Dollars ($150,000), to wit, the sum of Two Hundred and Fifty-three Thousand Seven Hundred and Thirty-two Dollars and Sixty-five Cents ($253,-732.65), as he, the said C. M. Summers, President, and he, the said Stewart G. Holt, Cashier, as aforesaid, then and there when so making said entry well knew, and the said false entry was then and there so

made as aforesaid with the intent then and there on the part of him, the said C. M. Summers, and him, the said Stewart G. Holt, to injure and defraud said association and certain persons to the Grand Jury unknown, and to deceive any officer of the said association and the Comptroller of the Currency and any agent appointed by said Comptroller of the Currency to examine the affairs of said association, contrary to the form of the Statutes in such case made and provided, and against the peace and dignity of the United States. **[10]**

COUNT FOUR.

That the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that heretofore, to wit, on the 22d day of March, A. D. 1910, in the town of Juneau, in Division Number One, District of Alaska, and within the jurisdiction of this court, said C. M. Summers and said Stewart G. Holt, he, the said C. M. Summers, being then and there the President, and he, the said Stewart G. Holt, being then and there the Cashier, of a certain national banking association then and there known and designated as First National Bank of Juneau, which said association theretofore had been duly organized and established and was then existing and doing business at the said town of Juneau, in the Division and District aforesaid, under the laws of the United States pertaining to national banking associations, did then and there wilfully, unlawfully, fraudulently and wrongfully make in a certain book then and there belonging to and in use by the said association in transacting its said banking business and in keeping its accounts and

then and there designated and known as "Journal D," on page 905 thereof, a certain false entry to the effect that on that date the sum of One Thousand and Seventeen Dollars and Seventy-three Cents ($1,017.-73) was transferred by said association to the Assistant United States Treasurer at San Francisco, California, **[11]** out of the funds and deposits with said association to the credit of the Treasurer of the United States, which entry was made as a debit item of a certain account known and designated as "Treasurer United States," and which entry was then and there in words and figures as follows, to wit:

"Treas. U. S.

Transfer Excess Deposits to Asst.

Treas. U. S. at San Francisco....1,017.73"

and which said entry so as aforesaid made in said book then and there purporting to show and did in substance and effect indicate and declare that the sum of One Thousand and Seventeen Dollars and Seventy-three Cents ($1,017.73) was then and there transferred and paid over by the said First National Bank of Juneau to the Assistant United States Treasurer at San Francisco, California, out of the funds on deposit in and with said association to the credit of the Treasurer of the United States, and that at the close of business hours on said day there remained in said First National Bank of Juneau to the credit of the Treasurer of the United States and the various disbursing officers of the United States no more than One Hundred and Fifty Thousand Dollars ($150,000);

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said entry so made as aforesaid was then and there wholly false in this, that neither said sum of One Thousand and Seventeen Dollars and Seventy-three Cents ($1,017.-73), nor any portion thereof, had at that time been nor was at that time so transferred by the said association or any of [12] its officers to the said Assistant United States Treasurer at San Francisco, California, but that, on the contrary, the said sum last above mentioned still remained on deposit in said First National Bank of Juneau, to the credit of the Treasurer of the United States, and at such time there remained on deposit with said association to the credit of the Treasurer of the United States, and the various disbursing officers of the United States a sum greater than One Hundred and Fifty Thousand Dollars ($150,000), to wit, the sum of Two Hundred and Fifty-four Thousand Seven Hundred and Fifty Dollars and Thirty-eight Cents ($254,750.38), as he, the said C. M. Summers, President, and he, the said Stewart G. Holt, Cashier, as aforesaid, then and there when so making said entry well knew, and the said false entry was then and there so made as aforesaid with the intent then and there on the part of him, the said C. M. Summers, and him, the said Stewart G. Holt to injure and defraud said association and certain persons to the Grand Jury unknown, and to deceive any officer of the said association and the Comptroller of the Currency and any agent appointed by said Comptroller of the Currency to examine the affairs of said association, contrary to the form of the Stat-

utes in such case made and provided, and against the peace and dignity of the United States. [13]

COUNT FIVE.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that heretofore, to wit, on the 11th day of April, A. D. 1910, in the town of Juneau, in Division Number One, District of Alaska, and within the jurisdiction of this court, said C. M. Summers and said Stewart G. Holt, he, the said C. M. Summers being then and there the President, and he, the said Stewart G. Holt, being then and there the Cashier, of a certain national banking association then and there known and designated as First National Bank of Juneau, which said association theretofore had been duly organized and established and was then existing and doing business at the said town of Juneau, in the Division and District aforesaid, under the laws of the United States pertaining to national banking associations, did then and there wilfully, unlawfully, fraudulently and wrongfully make in a certain book then and there belonging to and in use by the said association in transacting its said banking business and in keeping its accounts and then and there designated and known as "Journal D," on page 917 thereof, a certain false entry to the effect that on that date the sum of Five Thousand Two Hundred and Sixty Dollars and Seventy-five Cents ($5,260.75) was transferred by said association to the Assistant United States Treasurer at San Francisco, California, out of the funds and deposits [14] with said Association to the credit of the Treasurer of the United States, which entry was made as a debit

item of a certain account known and designated as "Treasurer United States," and which entry was then and there in words and figures as follows, to wit:
"Treasurer United States.

Transfer Excess Deposits to Asst.
Treas. U. S. at San Francisco....5,260.75

and which said entry so as aforesaid made in said book then and there purporting to show and did in substance and effect indicate and declare that the sum of Five Thousand Two Hundred and Sixty Dollars and Seventy-five Cents ($5,260.75) was then and there transferred and paid over by the said First National Bank of Juneau to the Assistant United States Treasurer at San Francisco, California, out of the funds on deposit in and with said association to the credit of the treasurer of the United States, and that at the close of business hours on said day there remained in said First National Bank of Juneau to the credit of the Treasurer of the United States and the various disbursing officers of the United States no more than One Hundred and Fifty Thousand Dollars ($150,000);

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said entry so made as aforesaid was then and there wholly false in this, that neither said sum of Five Thousand Two Hundred and Sixty Dollars and Seventy-five Cents ($5,260.75) nor [15] any portion thereof had at that time been nor was at that time so transferred by the said association or any of its officers to the said Assistant United States Treasurer at San Francisco, California, but that, on the contrary, the said sum

last above mentioned still remained on deposit in said First National Bank of Juneau to the credit of the Treasurer of the United States, and at such time there remained on deposit with said association to the credit of the Treasurer of the United States and the various disbursing officers of the United States a sum greater than One Hundred and Fifty Thousand Dollars ($150,000), to wit, the sum of Two Hundred and Twenty-nine Thousand Eight Hundred and Twenty-one Dollars and Thirty-eight Cents ($229,821.38), as he, the said C. M. Summers, President, and he, the said Stewart G. Holt, Cashier, as aforesaid, then and there when so making said entry well knew, and the said false entry was then and there so made as aforesaid with the intent then and there on the part of him, the said C. M. Summers, and him, the said Stewart G. Holt, to injure and defraud said association and certain persons to the Grand Jury unknown, and to deceive any officer of the said association and the Comptroller of the Currency any agent appointed by said Comptroller of the Currency to examine the affairs of said association, contrary to the form of the Statutes in such case made and provided, and against the peace and dignity of the United States. **[16]**

COUNT SIX.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that heretofore, to wit, on the 14th day of April, A. D. 1910, in the town of Juneau, in Division Number One, District of Alaska, and within the jurisdiction of this court, said C. M. Summers and said Stewart G. Holt, he, the said

C. M. Summers, being then and there the President, and he, the said Stewart G. Holt, being then and there the Cashier of a certain national banking association then and there known and designated as First National Bank of Juneau, which said association theretofore had been duly organized and established and was then existing and doing business at the said town of Juneau, in the Division and District aforesaid, under the laws of the United States pertaining to national banking associations, did then and there wilfully, unlawfully, fraudulently and wrongfully make in a certain book then and there belonging to and in use by the said association in transacting its said banking business and in keeping its accounts and then and there designated and known as "Journal D," on page 919 thereof, a certain false entry to the effect that on that date the sum of Two Thousand Four Hundred and Twenty-two Dollars and Forty-seven Cents ($2,422.47) was transferred by said association to the Assistant United States Treasurer at San Francisco, [17] California, out of the funds and deposits with said association to the credit of the Treasurer of the United States, which entry was made as a debit item of a certain account known and designated as "Treasurer United States," and which entry was then and there in words and figures as follows, to wit:

"Treasurer United States.

Transfer Excess Deposits to Asst.

Treas. U. S. at San Francisco....2,422.47"

and which said entry so as aforesaid made in said book then and there purporting to show and did in

substance and effect indicate and declare that the sum of Two Thousand Four Hundred and Twenty-two Dollars and Forty-seven Cents ($2,422.47) was then and there transferred and paid over by the said First National Bank of Juneau to the Assistant United States Treasurer at San Francisco, California, out of the funds on deposit in and with said association to the credit of the Treasurer of the United States, and that at the close of business hours on said day there remained in said First National Bank of Juneau to the credit of the Treasurer of the United States and the various disbursing officers of the United States no more than One Hundred and Fifty Thousand Dollars and Two Cents ($150,-000.02);

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said entry so made as aforesaid was then and there wholly false in this, that neither said sum of Two Thousand Four Hundred and Twenty-two Dollars and Forty-seven Cents ($2,422.47) nor [18] any portion thereof had at that time been nor was at that time so transferred by the said association or any of its officers to the said Assistant United States Treasurer at San Francisco, California, but that, on the contrary, the said sum last above mentioned still remained on deposit in said First National Bank of Juneau to the credit of the Treasurer of the United States, and at such time there remained on deposit with said association to the credit of the Treasurer of the United States and the various disbursing officers of the United States, a sum greater than One Hundred and

Fifty Thousand Dollars and Two Cents ($150,-000.02), to wit, the sum of Two Hundred and Thirty-two Thousand Eight Hundred and Fifty Dollars and Twenty-nine Cents ($232,850.29), as he, the said C. M. Summers, President, and he, the said Stewart G. Holt, Cashier, as aforesaid, then and there when so making said entry well knew, and the said false entry was then and there so made as aforesaid with the intent then and there on the part of him, the said C. M. Summers, and him, the said Stewart G. Holt, to injure and defraud said association and certain persons to the Grand Jury unknown, and to deceive any officer of the said association and the Comptroller of the Currency and any agent appointed by said Comptroller of the Currency to examine the affairs of said association, contrary to the form of the Statutes in such cases made and provided, and against the peace and dignity of the United States. [19]

COUNT SEVEN.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that heretofore, to wit, on the 16th day of April, A. D. 1910, in the town of Juneau, in Division Number One, District of Alaska, and within the jurisdiction of this court, said C. M. Summers and said Stewart G. Holt, he, the said C. M. Summers, being then and there the President, and he, the said Stewart G. Holt, being then and there the Cashier, of a certain national banking association then and there known and designated as First National Bank of Juneau, which said association theretofore had been duly organized and established and was then existing and doing business at the said

town of Juneau, in the Division and District aforesaid, under the laws of the United States pertaining to national banking associations, did then and there wilfully, unlawfully, fraudulently and wrongfully make in a certain book then and there belonging to and in use by the said association in transacting its said banking business and in keeping its accounts and then and there designated and know as "Journal D," on page 921 thereof, a certain false entry to the effect that on that date the sum of Two Thousand One Hundred and Fifty-six Dollars and Two Cents ($2,156.02) was transferred by said association to the Assistant United States Treasurer at San Francisco, California, [20] out of the funds and deposits with said association to the credit of the Treasurer of the United States, which entry was made as a debit item of a certain account known and designated as "Treasurer United States," and which entry was then and there in words and figures as follows, to wit:

"Treasurer United States.

Transfer Excess Deposits to Asst.
Treas. U. S. at San Francisco....2,156.02"

and which said entry so as aforesaid made in said book then and there purporting to show and did in substance and effect indicate and declare that the sum of Two Thousand One Hundred and Fifty-six Dollars and Two Cents ($2,156.02) was then and there transferred and paid over by the said First National Bank of Juneau to the Assistant United States Treasurer at San Francisco, California, out of the funds on deposit in and with said association

to the credit of the Treasurer of the United States, and that at the close of business hours of said day there remained in said First National Bank of Juneau to the credit of the Treasurer of the United States and the various disbursing officers of the United States no more than One Hundred and Fifty Thousand Dollars ($150,000);

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said entry so made as aforesaid was then and there wholly false in this, that neither said sum of Two Thousand One Hundred and Fifty-six Dollars and Two Cents ($2,156.02) nor any portion thereof had at that time been nor was at that [21] time so transferred by the said association or any of its officers to the said Assistant United States Treasurer at San Francisco, California, but that, on the contrary, the said sum last above mentioned still remained on deposit in said First National Bank of Juneau to the credit of the Treasurer of the United States, and at such time there remained on deposit with said association to the credit of the Treasurer of the United States and the various disbursing officers of the United States a sum greater than One Hundred and Fifty Thousand Dollars ($150,000), to wit, Two Hundred and Thirty-five Thousand and Six Dollars and Twenty-nine Cents ($235,006.29), as he, the said C. M. Summers, President, and he, the said Stewart G. Holt, Cashier, as aforesaid, then and there when so making said entry well knew, and the said false entry was then and there so made as aforesaid with the intent then and there on the part of him, the

said C. M. Summers, and him, the said Stewart G. Holt, to injure and defraud said association and certain persons to the Grand Jury unknown, and to deceive any officer of the said association and the Comptroller of the Currency and any agent appointed by said Comptroller of the Currency to examine the affairs of said association, contrary to the form of the Statutes in such case made and provided, and against the peace and dignity of the United States. [22]

COUNT EIGHT.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that heretofore, to wit, on the 3d day of May, A. D. 1910, in the town of Juneau, in Division Number One, District of Alaska, and within the jurisdiction of this court, said C. M. Summers and said Stewart G. Holt, he, the said C. M. Summers, being then and there the President, and he, the said Stewart G. Holt, being then and there the Cashier, of a certain national banking association then and there known and designated as First National Bank of Juneau, which said association theretofore had been duly organized and established and was then and there existing and doing business at the said town of Juneau, in the Division and District aforesaid, under the laws of the United States pertaining to national banking associations, did then and there wilfully, unlawfully, fraudulently and wrongfully make in a certain book then and there belonging to and in use by the said association in transacting its said banking business and in keeping its accounts and then and there designated

and known as "Journal D," on page 933 thereof, a certain false entry to the effect that on that date the sum of Eight Thousand Six Hundred and Sixteen Dollars and Fifty-four Cents ($8,616.54) was transferred by said association to the Assistant United States Treasurer at San Francisco, [23] California, out of the funds and deposits with said association to the credit of the Treasurer of the United States, which entry was made as a debit item of a certain account known and designated as "Treasurer United States," and which entry was then and there in words and figures as follows, to wit:

"Treasurer United States.

Transfer Excess Deposits to Asst.

Treas. U. S. at San Francisco....8,616.54"

and which said entry so as aforesaid made in said book then and there purporting to show and did in substance and effect indicate and declare that the sum of Eight Thousand Six Hundred and Sixteen Dollars and Fifty-four Cents ($8,616.54) was then and there transferred and paid over by the said First National Bank of Juneau to the Assistant United States Treasurer at San Francisco, California, out of the funds on deposit in and with said association to the credit of the Treasurer of the United States, and that at the close of business hours on said day there remained in said First National Bank of Juneau to the credit of the Treasurer of the United States and the various disbursing officers of the United States no more than One Hundred and Fifty Thousand Dollars ($150,000);

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said entry so made as aforesaid was then and there wholly false in this, that neither said sum of Eight Thousand Six Hundred and Sixteen Dollars and Fifty-four Cents ($8,616.54) nor [24] any portion thereof had at that time been nor was at that time so transferred by the said association or any of its officers to the said Assistant United States Treasurer at San Francisco, California, but that, on the contrary, the said sum last above mentioned still remained on deposit in said First National Bank of Juneau to the credit of the Treasurer of the United States, and at such time there remained on deposit with said association to the credit of the Treasurer of the United States and the various disbursing officers of the United States a sum greater than One Hundred and Fifty Thousand Dollars ($150,000), to wit, the sum of One Hundred and Eighty-four Thousand Six Hundred and Eighty-nine Dollars and Ninety-five Cents ($184,689.95), as he, the said C. M. Summers, President, and he, the said Stewart G. Holt, Cashier, as aforesaid then and there when so making said entry well knew, and the said false entry was then and there so made as aforesaid with the intent then and there on the part of him, the said C. M. Summers, and him, the said Stewart G. Holt, to injure and defraud said association and certain persons to the Grand Jury unknown, and to deceive any officer of the said association and the Comptroller of the Currency and any agent appointed by said Comptroller of the Currency to examine the affairs of said

association, contrary to the form of the Statutes in such case made and provided, and against the peace and dignity of the United States. [25]

COUNT NINE.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that heretofore, to wit, on the 4th day of May, A. D. 1910, in the town of Juneau, in Division Number One, District of Alaska, and within the jurisdiction of this court, said C. M. Summers and said Stewart G. Holt, he, the said C. M. Summers, being then and there the President, and he, the said Stewart G. Holt, being then and there the Cashier, of a certain national banking association then and there known and designated as First National Bank of Juneau, which said association theretofore had been duly organized and established and was then existing and doing business at the said town of Juneau, in the Division and District aforesaid, under the laws of the United States pertaining to national banking associations, did then and there wilfully, unlawfully, fraudulently and wrongfully make in a certain book then and there belonging to and in use by the said association in transacting its said banking business and in keeping its accounts and then and there designated and known as "Journal D," on page 933 thereof, a certain false entry to the effect that on that date the sum of Eight Thousand One Hundred and Seventy-one Dollars and Thirty-five Cents ($8,171.35) was transferred by said association to the Assistant United States Treasurer at San Francisco, California, [26] out of the funds and deposits with said

association to the credit of the Treasurer of the United States, which entry was made as a debit item of a certain account known and designated as "Treasurer United States," and which entry was then and there in words and figures as follows, to wit:

"Treasurer United States.

Transfer Excess Deposits to Asst.

Treas. U. S. at San Francisco....8,171.35"

and which said entry so as aforesaid made in said book then and there purporting to show and did in substance and effect indicate and declare that the sum of Eight Thousand One Hundred and Seventy-one Dollars and Thirty-five Cents ($8,171.35) was then and there transferred and paid over by the said First National Bank of Juneau to the Assistant United States Treasurer at San Francisco, California, out of the funds on deposit in and with said association to the credit of the Treasurer of the United States, and that at the close of business hours on said day there remained in said First National Bank of Juneau to the credit of the Treasurer of the United States and the various disbursing officers of the United States no more than One Hundred and Fifty Thousand Dollars ($150,000);

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said entry so made as aforesaid was then and there wholly false in this, that neither said sum of Eight Thousand One Hundred and Seventy-one Dollars and Thirty-five Cents ($8,171.35) [27] nor any portion thereof had at that time been nor was at that time so trans-

ferred by the said association or any of its officers to the said Assistant United States Treasurer at San Francisco, California, but that, on the contrary, the said sum last above mentioned still remained on deposit in said First National Bank of Juneau to the credit of the Treasurer of the United States, and at such time there remained on deposit with said association to the credit of the Treasurer of the United States and the various disbursing officers of the United States a sum greater than One Hundred and Fifty Thousand Dollars ($150,000), to wit, the sum of One Hundred and Ninety-two Thousand Eight Hundred and Sixty-one Dollars and Thirty Cents ($192,861.30), as he, the said C. M. Summers, President, and he, the said Stewart G. Holt, Cashier, as aforesaid, then and there when so making said entry well knew, and the said false entry was then and there so made as aforesaid with the intent then and there on the part of him, the said C. M. Summers, and him, the said Stewart G. Holt, to injure and defraud said association and certain persons to the Grand Jury unknown, and to deceive any officer of the said association and the Comptroller of the Currency and any agent appointed by said Comptroller of the Currency to examine the affairs of said association, contrary to the form of the Statutes in such case made and provided, and against the peace and dignity of the United States. [28]

COUNT TEN.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that heretofore, to wit, on the 5th day of May, A. D. 1910, in the town of

Juneau, in Division Number One, District of Alaska, and within the jurisdiction of this court, said C. M. Summers and said Stewart G. Holt, he, the said C. M. Summers, being then and there the President, and he, the said Stewart G. Holt, being then and there the Cashier, of a certain national banking association then and there known and designated as First National Bank of Juneau, which said association theretofore had been duly organized and established and was then existing and doing business at the said town of Juneau, in the Division and District aforesaid, under the laws of the United States pertaining to national banking associations, did then and there wilfully, unlawfully, fraudulently and wrongfully make in a certain book then and there belonging to and in use by the said association in transacting its said banking business and in keeping its accounts and then and there designated and known as "Journal D," page 935 thereof, a certain false entry to the effect that on that date the sum of Six Thousand Three Hundred and Fifty-two Dollars and Fifteen Cents ($6,352.15) was transferred by said association to the Assistant United States Treasurer at San Francisco, [29] California, out of the funds and deposits with said association to the credit of the Treasurer of the United States, which entry was made as a debit item of a certain account known and designated as "Treasurer United States," and which entry was then and there in words and figures as follows, to wit:

"Treasurer United States.

Transfer Excess Deposits to Asst.

Treas. U. S. at San Francisco....6,352.15"

and which said entry so as aforesaid made in said book then and there purporting to show and did in substance and effect indicate and declare that the sum of Six Thousand Three Hundred and Fifty-two Dollars and Fifteen Cents ($6,352.15) was then and there transferred and paid over by the said First National Bank of Juneau to the Assistant United States Treasurer at San Francisco, California, out of the funds on deposit in and with said association to the credit of the Treasurer of the United States, and that at the close of business hours on said day there remained in said First National Bank of Juneau to the credit of the Treasurer of the United States and the various disbursing officers of the United States no more than One Hundred and Fifty Thousand Dollars ($150,000);

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said entry so made as aforesaid was then and there wholly false in this, that neither said sum of Six Thousand Three Hundred and Fifty-two Dollars and Fifteen Cents ($6,352.15) [30] nor any portion thereof had at that time been nor was at that time so transferred by the said association or any of its officers to the said Assistant United States Treasurer at San Francisco, California, but that, on the contrary, the said sum last above mentioned still remained on deposit in said First National Bank of Juneau to the credit of the Treasurer of the United States, and

at such time there remained on deposit with said association to the credit of the Treasurer of the United States and the various disbursing officers of the United States a sum greater than One Hundred and Fifty Thousand Dollars ($150,000), to wit, the sum of One Hundred and Ninety-nine Thousand Two Hundred and Thirteen Dollars and Forty-five Cents ($199,213.45), as he, the said C. M. Summers, President, and he, the said Stewart G. Holt, Cashier, as aforesaid then and there when so making said entry well knew, and the said false entry was then and there so made as aforesaid with the intent then and there on the part of him, the said C. M. Summers, and him, the said Stewart G. Holt, to injure and defraud said association and certain persons to the Grand Jury unknown, and to deceive any officer of the said association and the Comptroller of the Currency and any agent appointed by said Comptroller of the Currency to examine the affairs of said association, contrary to the form of the Statutes in such case made and provided, and against the peace and dignity of the United States. [31]

COUNT ELEVEN.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that heretofore, to wit, on the 9th day of May, A. D. 1910, in the town of Juneau, in Division Number One, District of Alaska, and within the jurisdiction of this court, said C. M. Summers and said Stewart G. Holt, he, the said C. M. Summers, being then and there the President, and he, the said Stewart G. Holt, being then and there the Cashier, of a certain national banking

association then and there known and designated as First National Bank of Juneau, which said association theretofore had been duly organized and established and was then existing and doing business at the said town of Juneau, in the Division and District aforesaid, under the laws of the United States pertaining to national banking associations, did then and there wilfully, unlawfully, fraudulently and wrongfully make in a certain book then and there belonging to and in use by the said association in transacting its said banking business and in keeping its accounts and then and there designated and known as "Journal D," on page 937 thereof, a certain false entry to the effect that on that date the sum of Sixteen Thousand Three Hundred and Twenty-eight Dollars and Sixty-eight Cents ($16,-328.68) was transferred by said association to the Assistant United States Treasurer at San Francisco, **[32]** California, out of the funds and deposits with said association to the credit of the Treasurer of the United States, which entry was made as a debit item of a certain account known and designated as "Treasurer United States," and which entry was then and there in words and figures as follows, to wit:

"Treasurer United States.

Transfer Excess Deposits to Asst.

Treas. U. S. at San Francisco. . .16,328.68"

and which said entry so as aforesaid made in said book then and there purporting to show and did in substance and effect indicate and declare that the sum of Sixteen Thousand Three Hundred and

Twenty-eight Dollars and Sixty-eight Cents ($16,-328.68) was then and there transferred and paid over by the said First National Bank of Juneau to the Assistant United States Treasurer at San Francisco, California, out of the funds on deposit in and with said association to the credit of the Treasurer of the United States, and that at the close of business hours on said day there remained in said First National Bank of Juneau to the credit of the Treasurer of the United States and the various disbursing officers of the United States no more than One Hundred and Fifty Thousand Dollars ($150,-000);

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said entry so made as aforesaid was then and there wholly false in this, that neither said sum of Sixteen Thousand Three Hundred and Twenty-eight Dollars and Sixty-eight Cents ($16,328.68) nor any portion thereof had at that **[33]** time been nor was at that time so transferred by the said association or any of its officers to the said Assistant United States Treasurer at San Francisco, California, but that, on the contrary, the said sum last above mentioned still remained on deposit in said First National Bank of Juneau to the credit of the Treasurer of the United States, and at such time there remained on deposit with said association to the credit of the Treasurer of the United States and the various disbursing officers of the United States a sum greater than One Hundred and Fifty Thousand Dollars ($150,000), to wit, the sum of Two

Hundred and Sixteen Thousand Five Hundred and Ninety-one Dollars and Ninety-two Cents ($216,-591.92), as he, the said C. M. Summers, President, and he, the said Stewart G. Holt, Cashier, as aforesaid, then and there when so making said entry well knew, and the said false entry was then and there so made as aforesaid with the intent then and there on the part of him, the said C. M. Summers, and him, the said Stewart G. Holt, to injure and defraud said association and certain persons to the Grand Jury unknown, and to deceive any officer of the said association and the Comptroller of the Currency and any agent appointed by said Comptroller of the Currency to examine the affairs of said association, contrary to the form of the Statutes in such case made and provided, and against the peace and dignity of the United States. **[34]**

COUNT TWELVE.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that heretofore, to wit, on the 3d day of June, A. D. 1910, in the town of Juneau, in Division Number One, District of Alaska, and within the jurisdiction of this court, said C. M. Summers and said Stewart G. Holt, he, the said C. M. Summers, being then and there the President, and he, the said Stewart G. Holt, being then and there the Cashier, of a certain national banking association then and there known and designated as First National Bank of Juneau, which said association theretofore had been duly organized and established and was then existing and doing business

at the said town of Juneau, in the Division and District aforesaid, under the laws of the United States pertaining to national banking associations, did then and there wilfully, unlawfully, fraudulently and wrongfully make in a certain book then and there belonging to and in use by the said association in transacting its said banking business and in keeping its accounts and then and there designated and known as "Journal D," on page 957 thereof, a certain false entry to the effect that on that date the sum of Six Thousand One Hundred and Thirty Dollars and Twenty Cents ($6,130.20) was transferred by said association to the Assistant United States Treasurer **[35]** at San Francisco, California, out of the funds and deposits with said association to the credit of the Treasurer of the United States, which entry was made as a debit item of a certain account known and designated as "Treasurer United States," and which entry was then and there in words and figures as follows, to wit:

"Treasurer United States.

Transfer Excess Deposits to Asst.

Treas. U. S. at San Francisco....6,130.20"

and which said entry so as aforesaid made in said book then and there purporting to show and did in substance and effect indicate and declare that the sum of Six Thousand One Hundred and Thirty Dollars and Twenty Cents ($6,130.20) was then and there transferred and paid over by the said First National Bank of Juneau to the Assistant United States Treasurer at San Francisco, California, out of the funds on deposit in and with said association

to the credit of the Treasurer of the United States, and that at the close of business hours on said day there remained in said First National Bank of Juneau to the credit of the Treasurer of the United States and the various disbursing officers of the United States no more than One Hundred and Fifty Thousand and Twenty Dollars ($150,020);

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said entry so made as aforesaid was then and there wholly false in this, that neither said sum of Six Thousand One Hundred and Thirty Dollars and Twenty Cents ($6,130.20) nor any portion **[36]** thereof had at that time been nor was at that time so transferred by the said association or any of its officers to the said Assistant United States Treasurer at San Francisco, California, but that, on the contrary, the said sum last above mentioned still remained on deposit in said First National Bank of Juneau to the credit of the Treasurer of the United States and at such time there remained on deposit with said association to the credit of the Treasurer of the United States and the various disbursing officers of the United States a sum greater than One Hundred and Fifty Thousand and Twenty Dollars ($150,020), to wit, the sum of Two Hundred and Fifteen Thousand Seven Hundred and Thirty-four Dollars and Forty-eight Cents ($215,734.48), as he, the said C. M. Summers, President, and he, the said Stewart G. Holt, Cashier, as aforesaid, then and there when so making said entry well knew, and the said false entry was then and there so made as aforesaid with the

intent then and there on the part of him, the said C. M. Summers, and him, the said Stewart G. Holt, to injure and defraud said association and certain persons to the Grand Jury unknown, and to deceive any officer of the said association and the Comptroller of the Currency and any agent appointed by said Comptroller of the Currency to examine the affairs of said association, contrary to the form of the Statutes in such case made and provided, and against the peace and dignity of the United States. **[37]**

COUNT THIRTEEN.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that heretofore, to wit, on the 4th day of June, A. D. 1910, in the town of Juneau, in Division Number One, District of Alaska, and within the jurisdiction of this court, said C. M. Summers and said Stewart G. Holt, he, the said C. M. Summers, being then and there the President, and he, the said Stewart G. Holt, being then and there the Cashier, of a certain national banking association then and there known and designated as First National Bank of Juneau, which said association theretofore had been duly organized and established and was then existing and doing business at the said town of Juneau, in the Division and District aforesaid, under the laws of the United States pertaining to national banking associations, did then and there wilfully, unlawfully, fraudulently and wrongfully make in a certain book then and there belonging to and in use by the said association in transacting its said banking business and in keeping its accounts and then and there designated and

known as "Journal D," on page 957 thereof, a certain false entry to the effect that on that date the sum of Ten Thousand Seven Hundred and Thirty-two Dollars and Thirty-four Cents ($10,732.34) was transferred by said association to the Assistant United States Treasurer at San Francisco, California, out of the [38] funds and deposits with said association to the credit of the Treasurer of the United States, which entry was made as a debit item of a certain account known and designated as "Treasurer United States," and which entry was then and there in words and figures as follows, to wit:

"Treasurer United States.

Transfer Excess Deposits to Asst.

Treas. U. S. at San Francisco...10,732.34"

and which said entry so as aforesaid made in said book then and there purporting to show and did in substance and effect indicate and declare that the sum of Ten Thousand Seven Hundred and Thirty-two Dollars and Thirty-four Cents ($10,732.34) was then and there transferred and paid over by the said First National Bank of Juneau to the Assistant United States Treasurer at San Francisco, California, out of the funds on deposit in and with said association to the credit of the Treasurer of the United States, and that at the close of business hours on said day there remained in said First National Bank of Juneau to the credit of the Treasurer of the United States and the various disbursing officers of the United States no more than One Hundred and Fifty Thousand and Twenty Dollars ($150,020);

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said entry so made as aforesaid was then and there wholly false in this, that neither said sum of Ten Thousand Seven Hundred and Thirty-two Dollars and Thirty-four Cents ($10,732.34) **[39]** nor any portion thereof had at that time been nor was at that time so transferred by the said association or any of its officers to the said Assistant United States Treasurer at San Francisco, California, but that, on the contrary, the said sum last above mentioned still remained on deposit in said First National Bank of Juneau to the credit of the Treasurer of the United States, and at such time there remained on deposit with said association to the credit of the Treasurer of the United States and the various disbursing officers of the United States a sum greater than One Hundred and Fifty Thousand and Twenty Dollars ($150,-020), to wit, the sum of Two Hundred and Twenty-six Thousand Four Hundred and Sixty-six Dollars and Eighty-two Cents ($226,466.82), as he, the said C. M. Summers, President, and he, the said Stewart G. Holt, Cashier, as aforesaid, then and there when so making said entry well knew, and the said false entry was then and there so made as aforesaid with the intent then and there on the part of him, the said C. M. Summers, and him, the said Stewart G. Holt, to injure and defraud said association and certain persons to the Grand Jury unknown, and to deceive any officer of the said association and the Comptroller of the Currency and any agent appointed by said Comptroller of the Currency to ex-

amine the affairs of said association, contrary to the form of the Statutes in such case made and provided, and against the peace and dignity of the United States. **[40]**

COUNT FOURTEEN.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that heretofore, to wit, on the 9th day of June, A. D. 1910, in the town of Juneau, in Division Number One, District of Alaska, and within the jurisdiction of this court, said C. M. Summers and said Stewart G. Holt, he, the said C. M. Summers being then and there the President, and he, the said Stewart G. Holt, being then and there the Cashier, of a certain national banking association then and there known and designated as First National Bank of Juneau, which said association theretofore had been duly organized and established and was then existing and doing business at the said town of Juneau, in the Division and District aforesaid, under the laws of the United States pertaining to national banking associations, did then and there wilfully, unlawfully, fraudulently and wrongfully make in a certain book then and there belonging to and in use by the said association in transacting its said banking business and in keeping its accounts and then and there designated and known as "Journal D," on page 961 thereof, a certain false entry to the effect that on that date the sum of Three Thousand Nine Hundred and Eighty-four Dollars and Seventy-two Cents ($3,984.72) was transferred by said association to the Assistant United States Treasurer at San Francisco, **[41]**

California, out of the funds and deposits with said association to the credit of the Treasurer of the United States, which entry was made as a debit item of a certain account known and designated as "Treasurer United States," and which entry was then and there in words and figures as follows, to wit:

"Treasurer United States.

Transfer Excess Deposits to Asst.

Treas. U. S. at San Francisco... 3,984.72"

and which said entry so as aforesaid made in said book then and there purporting to show and did in substance and effect indicate and declare that the sum of Three Thousand Nine Hundred and Eighty-four Dollars and Seventy-two Cents ($3,984.72) was then and there transferred and paid over by the said First National Bank of Juneau to the Assistant United States Treasurer at San Francisco, California, out of the funds on deposit in and with said association to the credit of the Treasurer of the United States, and that at the close of business hours on said day there remained in said First National Bank of Juneau to the credit of the Treasurer of the United States and the various disbursing officers of the United States no more than One Hundred and Fifty Thousand Dollars ($150,000);

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said entry so made as aforesaid was then and there wholly false in this, that neither said sum of Three Thousand Nine Hundred and Eighty-four Dollars and Seventy-two Cents ($3,984.72) nor any portion thereof had

at that time [42] been nor was at that time so transferred by the said association or any of its officers to the said Assistant United States Treasurer at San Francisco, California, but that, on the contrary, the said sum last above mentioned still remained on deposit in said First National Bank of Juneau to the credit of the Treasurer of the United States, and at such time there remained on deposit with said association to the credit of the Treasurer of the United States and the various disbursing officers of the United States a sum greater than One Hundred and Fifty Thousand Dollars ($150,000), to wit, the sum of Two Hundred and Nine Thousand Nine Hundred and Eighty-nine Dollars and Thirteen Cents ($209,989.13), as he, the said C. M. Summers, President, and he, the said Stewart G. Holt, Cashier, as aforesaid then and there when so making said entry well knew, and the said false entry was then and there so made as aforesaid with the intent then and there on the part of him, the said C. M. Summers, and him, the said Stewart G. Holt, to injure and defraud said association and certain persons to the Grand Jury unknown, and to deceive any officer of the said association and the Comptroller of the Currency and any agent appointed by said Comptroller of the Currency to examine the affairs of said association, contrary to the form of the Statutes in such case made and provided, and against the peace and dignity of the United States. [43]

COUNT FIFTEEN.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that heretofore, to wit,

on the 11th day of June, A. D. 1910, in the town of Juneau, in Division Number One, District of Alaska, and within the jurisdiction of this court, said C. M. Summers and said Stewart G. Holt, he the said C. M. Summers, being then and there the President, and he, the said Stewart G. Holt, being then and there the Cashier, of a certain national banking association then and there known and designated as First National Bank of Juneau, which said association theretofore had been duly organized and established and was then existing and doing business at the said town of Juneau, in the Division and District aforesaid, under the laws of the United States pertaining to national banking associations, did then and there wilfully, unlawfully, fraudulently and wrongfully make in a certain book then and there belonging to and in use by the said association in transacting its said banking business and in keeping its accounts and then and there designated and known as "Journal D," on page 963 thereof, a certain false entry to the effect that on that date the sum of Five Thousand Seven Hundred and Twelve Dollars and Fifteen Cents ($5,712.15) was transferred by said association to the Assistant United States Treasurer at San Francisco, California, out of the funds and deposits with said association **[44]** to the credit of the Treasurer of the United States, which entry was made as a debit item of a certain account known and designated as "Treasurer United States," and which entry was then and there in words and figures as follows, to wit:

"Treasurer United States.

Transfer Excess Deposits to Asst.

Treas. U. S. at San Francisco.....5,712.15"

and which said entry so as aforesaid made in said book then and there purporting to show and did in substance and effect indicate and declare that the sum of Five Thousand Seven Hundred and Twelve Dollars and Fifteen Cents ($5,712.15) was then and there transferred and paid over by the said First National Bank of Juneau to the Assistant United States Treasurer at San Francisco, California, out of the funds on deposit in and with said association to the credit of the Treasurer of the United States, and that at the close of business hours on said day there remained in said First National Bank of Juneau to the credit of the Treasurer of the United States and the various disbursing officers of the United States no more than One Hundred and Fifty Thousand Dollars ($150,000);

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said entry so made as aforesaid was then and there wholly false in this, that neither said sum of Five Thousand Seven Hundred and Twelve Dollars and Fifteen Cents ($5,712.15) [45] nor any portion thereof had at that time been nor was at that time so transferred by the said association or any of its officers to the said Assistant United States Treasurer at San Francisco, California, but that, on the contrary, the said sum last above mentioned still remained on deposit in said First National Bank of Juneau to the credit of the Treasurer of the United States, and

at such time there remained on deposit with said association to the credit of the Treasurer of the United States and the various disbursing officers of the United States a sum greater than One Hundred and Fifty Thousand Dollars ($150,000), to wit, the sum of Two Hundred and Fifteen Thousand Seven Hundred and Six Dollars and Seventy-six Cents ($215,706.76), as he, the said C. M. Summers, President, and he, the said Stewart G. Holt, Cashier, as aforesaid then and there when so making said entry well knew, and the said false entry was then and there so made as aforesaid with the intent then and there on the part of him, the said C. M. Summers, and him, the said Stewart G. Holt, to injure and defraud said association and certain persons to the Grand Jury unknown, and to deceive any officer of the said association and the Comptroller of the Currency and any agent appointed by said Comptroller of the Currency to examine the affairs of said association, contrary to the form of the Statutes in such case made and provided, and against the peace and dignity of the United States. **[46]**

COUNT SIXTEEN.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that heretofore, to wit, on the 14th day of June, A. D. 1910, in the town of Juneau, in Division Number One, District of Alaska, and within the jurisdiction of this court, said C. M. Summers, and said Stewart G. Holt, he, the said C. M. Summers, being then and there the President, and he, the said Stewart G. Holt, being then and there the Cashier, of a certain national banking as-

sociation then and there known and designated as First National Bank of Juneau, which said association theretofore had been duly organized and established and was then existing and doing business at the said town of Juneau, in the Division and District aforesaid, under the laws of the United States pertaining to national banking associations, did then and there wilfully, unlawfully, fraudulently and wrongfully make in a certain book then and there belonging to and in use by the said association in transacting its said banking business and in keeping its accounts and then and there designated and known as "Journal D," on page 965 thereof, a certain false entry to the effect that on that date the sum of Two Thousand Two Hundred and Ninety-nine Dollars and Ninety-nine Cents ($2,299.99) was transferred by said association to the Assistant United States Treasurer at San Francisco, California, out of the funds and [47] deposits with said association to the credit of the Treasurer of the United States, which entry was made as a debit item of a certain account known and designated as "Treasurer United States," and which entry was then and there in words and figures as follows, to wit:

"Treasurer United States.

Transfer Excess Deposits to Asst.

Treas. U. S. at San Francisco....2,299.99"

and which said entry so as aforesaid made in said book then and there purporting to show and did in substance and effect indicate and declare that the sum of Two Thousand Two Hundred and Ninety-

nine Dollars and Ninety-nine Cents ($2,299.99) was then and there transferred and paid over by the said First National Bank of Juneau to the Assistant United States Treasurer at San Francisco, California, out of the funds on deposit in and with said association to the credit of the Treasurer of the United States, and that at the close of business hours on said day there remained in said First National Bank of Juneau to the credit of the Treasurer of the United States and the various disbursing officers of the United States no more than One Hundred and Forty-nine Thousand Nine Hundred and Ninety-nine Dollars and Ninety-two Cents ($149,999.92);

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said entry so made as aforesaid was then and there wholly false in this, that neither said sum of Two Thousand Two Hundred and Ninety-nine Dollars and Ninety-nine Cents ($2,299.99) [48] nor any portion thereof had at that time been nor was at that time so transferred by the said association or any of its officers to the said Assistant United States Treasurer at San Francisco, California, but that, on the contrary, the said sum last above mentioned still remained on deposit in said First National Bank of Juneau to the credit of the Treasurer of the United States, and at such time there remained on deposit with said association to the credit of the Treasurer of the United States and the various disbursing officers of the United States a sum greater than One Hundred and Forty-nine Thousand Nine Hundred and Ninety-nine Dollars and Ninety-two Cents ($149,999.92), to wit,

the sum of Two Hundred and Eighteen Thousand and Six Dollars and Sixty-seven Cents ($218,006.67), as he, the said C. M. Summers, President, and he, the said Stewart G. Holt, Cashier, as aforesaid, then and there when so making said entry well knew, and the said false entry was then and there so made as aforesaid with the intent then and there on the part of him, the said C. M. Summers, and him, the said Stewart G. Holt, to injure and defraud said association and certain persons to the Grand Jury unknown, and to deceive any officer of the said association and the Comptroller of the Currency and any agent appointed by said Comptroller of the Currency to examine the affairs of said association, contrary to the form of the Statutes in such case made and provided, and against the peace and dignity of the United States. [49]

COUNT SEVENTEEN.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that heretofore, to wit, on the 22d day of April, A. D. 1911, in the town of Juneau, in Division Number One, District of Alaska, and within the jurisdiction of this court, said C. M. Summers and said Stewart G. Holt, he, the said C. M. Summers, being then and there the President, and he, the said Stewart G. Holt, being then and there the Cashier, of a certain national banking association then and there known and designated as First National Bank of Juneau, which said association theretofore had been duly organized and established and was then existing and doing business at the said town of Juneau, in the Division and Dis-

trict aforesaid, under the laws of the United States pertaining to national banking associations, did then and there wilfully, unlawfully, fraudulently and wrongfully make in a certain book then and there belonging to and in use by the said association in transacting its said banking business and in keeping its accounts and then and there designated and known as "Journal D–A," on page 171 thereof, a certain false entry to the effect that on that date the sum of Ten Thousand Five Hundred and Twenty-four Dollars and Sixty-five Cents ($10,524.65) was transferred by said association to the Assistant **[50]** United States Treasurer at San Francisco, California, out of the funds and deposits with said association to the credit of the Treasurer of the United States, which entry was made as a debit item of a certain account known and designated as "Treasurer United States," and which entry was then and there in words and figures as follows, to wit:

"Treas. U. S.

Transfer Excess Deposits to Asst.

Treas. U. S. at San Francisco....10,524.65"

and which said entry so as aforesaid made in said book then and there purporting to show and did in substance and effect indicate and declare that the sum of Ten Thousand Five Hundred and Twenty-four Dollars and Sixty-five Cents ($10,524.65) was then and there transferred and paid over by the said First National Bank of Juneau to the Assistant United States Treasurer at San Francisco, California, out of the funds on deposit in and with said association to the credit of the Treasurer of the

United States, and that at the close of business hours on said day there remained in said First National Bank of Juneau to the credit of the Treasurer of the United States and the various disbursing officers of the United States no more than One Hundred and Fifty Thousand Dollars ($150,000);

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said entry so made as aforesaid was then and there wholly false in this, that neither said sum of Ten Thousand Five Hundred and Twenty-four Dollars and Sixty-five [51] Cents ($10,524.65) nor any portion thereof had at that time been nor was at that time so transferred by the said association or any of its officers to the said Assistant United States Treasurer at San Francisco, California, but that, on the contrary, the said sum last above mentioned still remained on deposit in said First National Bank of Juneau to the credit of the Treasurer of the United States, and at such time there remained on deposit with said association to the credit of the Treasurer of the United States and the various disbursing officers of the United States a sum greater than One Hundred and Fifty Thousand Dollars ($150,000), to wit, the sum of One Hundred and Ninety-one Thousand Seven Hundred and Ninety-five Dollars and Thirty-one Cents ($191,795.31), as he, the said C. M. Summers, President, and he, the said Stewart G. Holt, Cashier, as aforesaid, then and there when so making said entry well knew, and the said false entry was then and there so made as aforesaid with the intent then and there on the part of him, the said C.

M. Summers, and him, the said Stewart G. Holt, to injure and defraud said association and certain persons to the Grand Jury unknown, and to deceive any officer of the said association and the Comptroller of the Currency and any agent appointed by said Comptroller of the Currency to examine the affairs of said association, contrary to the form of the Statutes in such case made and provided, and against the peace and dignity of the United States. [52]

COUNT EIGHTEEN.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that heretofore, to wit, on the 29th day of April, A. D. 1911, in the town of Juneau, in Division Number One, District of Alaska, and within the jurisdiction of this court, said C. M. Summers and said Stewart G. Holt, he, the said C. M. Summers, being then and there the President, and he, the said Stewart G. Holt, being then and there the Cashier, of a certain national banking association then and there known and designated as First National Bank of Juneau, which said association theretofore had been duly organized and established and was then existing and doing business at the said town of Juneau, in the Division and District aforesaid, under the laws of the United States pertaining to national banking associations, did then and there wilfully, unlawfully, fraudulently and wrongfully make in a certain book then and there belonging to and in use by the said association in transacting its said banking business and in keeping its accounts and then and there designated and

known as "Journal D–A," on page 175 thereof, a certain false entry to the effect that on that date the sum of One Thousand Seven Hundred and Sixty Dollars and Fourteen Cents ($1,760.14) was transferred by said association to the Assistant United States Treasurer at San Francisco, California, out of [53] the funds and deposits with said association to the credit of the Treasurer of the United States, which entry was made as a debit item of a certain account known and designated as "Treasurer United States," and which entry was then and there in words and figures as follows, to wit:

"Treasurer United States.

Transfer Excess Dept. Ass't Tr. U. S.

S. F...... ....1,760.14"

and which said entry so as aforesaid made in said book then and there purporting to show and did in substance and effect indicate and declare that the sum of One Thousand Seven Hundred and Sixty Dollars and Fourteen Cents ($1,760.14) was then and there transferred and paid over by the said First National Bank of Juneau to the Assistant United States Treasurer at San Francisco, California, out of the funds on deposit in and with said association to the credit of the Treasurer of the United States, and that at the close of the business hours on said day there remained in said First National Bank of Juneau to the credit of the Treasurer of the United States and the various disbursing officers of the United States no more than One Hundred and Fifty Thousand Dollars ($150,000);

And the Grand Jurors aforesaid, upon their oaths

aforesaid, do further present that the said entry so made as aforesaid was then and there wholly false in this, that neither said sum of One Thousand Seven Hundred and Sixty Dollars and Fourteen Cents ($1,760.14) nor any [54] portion thereof had at that time been nor was at that time so transferred by the said association or any of its officers to the said Assistant United States Treasurer at San Francisco, California, but that, on the contrary, the said sum last above mentioned still remained on deposit in said First National Bank of Juneau to the credit of the Treasurer of the United States and at such time there remained on deposit with said association to the credit of the Treasurer of the United States and the various disbursing officers of the United States a sum greater than One Hundred and Fifty Thousand Dollars ($150,000), to wit, the sum of One Hundred and Seventy-two Thousand Nine Hundred and Thirty-seven Dollars and Five Cents ($172,937.05), as he, the said C. M. Summers, President, and he, the said Stewart G. Holt, Cashier, as aforesaid, then and there when so making said entry well knew, and the said false entry was then and there so made as aforesaid with the intent then and there on the part of him, the said C. M. Summers, and him, the said Stewart G. Holt, to injure and defraud said association and certain persons to the Grand Jury unknown, and to deceive any officer of the said association and the Comptroller of the Currency and any agent appointed by said Comptroller of the Currency to examine the affairs of said association, contrary to the form of the Statutes in such case made and provided, and against

the peace and dignity of the United States. [55]

COUNT NINETEEN.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that heretofore, to wit, on the 4th day of May, A. D. 1911, in the town of Juneau, in Division Number One, District of Alaska, and within the jurisdiction of this court, said C. M. Summers and said Stewart G. Holt, he, the said C. M. Summers, being then and there the President, and he, the said Stewart G. Holt, being then and there the Cashier, of a certain national banking association then and there known and designated as First National Bank of Juneau, which said association theretofore had been duly organized and established and was then existing and doing business at the said town of Juneau, in the Division and District aforesaid, under the laws of the United States pertaining to national banking associations, did then and there wilfully, unlawfully, fraudulently and wrongfully make in a certain book then and there belonging to and in use by the said association in transacting its said banking business and in keeping its accounts and then and there designated and known as "Journal D–A," on page 181 thereof, a certain false entry to the effect that on that date the sum of Thirteen Thousand Three Hundred and Seven Dollars and Ninety-seven Cents ($13,307.97) was transferred by said association to the Assistant United States Treasurer at San Francisco, [56] California, out of the funds and deposits with said association to the credit of the Treasurer of the United States, which entry was made as a debit item of a certain account known

and designated as "Treasurer United States," and which entry was then and there in words and figures as follows, to wit:

"Treas. U. S.

Transfer Excess Deposits to Asst.

Treas. U. S. at San Francisco...13,307.97"

and which said entry so as aforesaid made in said book then and there purporting to show and did in substance and effect indicate and declare that the sum of Thirteen Thousand Three Hundred and Seven Dollars and Ninety-seven Cents ($13,307.97) was then and there transferred and paid over by the said First National Bank of Juneau to the Assistant United States Treasurer at San Francisco, California, out of the funds on deposit in and with said association to the credit of the Treasurer of the United States, and that at the close of business hours on said day there remained in said First National Bank of Juneau to the credit of the Treasurer of the United States and the various disbursing officers of the United States no more than One Hundred and Fifty Thousand Dollars ($150,000);

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said entry so made as aforesaid was then and there wholly false in this, that neither said sum of Thirteen Thousand Three Hundred and Seven Dollars and Ninety-seven Cents ($13,307.97) nor any [57] portion thereof had at that time been nor was at that time so transferred by the said association or any of its officers to the said Assistant United States Treasurer at San Francisco, California, but that, on the contrary, the

said sum last above mentioned still remained on deposit in said First National Bank of Juneau to the credit of the Treasurer of the United States, and at such time there remained on deposit with said association to the credit of the Treasurer of the United States and the various disbursing officers of the United States a sum greater than One Hundred and Fifty Thousand Dollars ($150,000), to wit, the sum of One Hundred and Ninety Thousand and Fifty-seven Dollars and Ninety-one Cents ($190,057.91), as he, the said C. M. Summers, President, and he, the said Stewart G. Holt, Cashier, as aforesaid, then and there when so making said entry well knew, and the said false entry was then and there so made as aforesaid with the intent then and there on the part of him, the said C. M. Summers, and him, the said Stewart G. Holt, to injure and defraud said association and certain persons to the Grand Jury unknown, and to deceive any officer of the said association and the Comptroller of the Currency and any agent appointed by said Comptroller of the Currency to examine the affairs of said association, contrary to the form of the Statutes in such case made and provided, and against the peace and dignity of the United States. [58]

COUNT TWENTY.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that heretofore, to wit, on the 6th day of May, A. D. 1911, in the town of Juneau, in Division Number One, District of Alaska, and within the jurisdiction of this court, said C. M. Summers, and said Stewart G. Holt, he, the said C. M. Summers, being then and there the President, and he,

the said Stewart G. Holt, being then and there the Cashier, of a certain national banking association, then and there known and designated as First National Bank of Juneau, which said association theretofore had been duly organized and established and was then existing and doing business at the said town of Juneau, in the Division and District aforesaid, under the laws of the United States pertaining to national banking associations, did then and there wilfully, unlawfully, fraudulently and wrongfully make in a certain book then and there belonging to and in use by the said association in transacting its said banking business and in keeping its accounts and then and there designated and known as "Journal D–A," on page 183 thereof, a certain false entry to the effect that on that date the sum of Four Thousand and Thirty-three Dollars and Fifty-two Cents ($4,033.-52) was transferred by said association to the Assistant United States Treasurer at San Francisco, California, out of [59] the funds and deposits with said association to the credit of the Treasurer of the United States, which entry was made as a debit item of a certain account known and designated as "Treasurer United States," and which entry was then and there in words and figures as follows, to wit:

"Treasurer United States.

Transfer Excess Deposits to Asst.

Treas. U. S. at San Francisco....4,033.52"

and which said entry so as aforesaid made in said book then and there purporting to show and did in substance and effect indicate and declare that the sum

of Four Thousand and Thirty-three Dollars and Fifty-two Cents ($4,033.52) was then and there transferred and paid over by the said First National Bank of Juneau to the Assistant United States Treasurer at San Francisco, California, out of the funds on deposit in and with said association to the credit of the Treasurer of the United States, and that at the close of business hours on said day there remained in said First National Bank of Juneau to the credit of the Treasurer of the United States and the various disbursing officers of the United States no more than One Hundred and Fifty Thousand Dollars ($150,-000);

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said entry so made as aforesaid was then and there wholly false, in this, that neither the sum of Four Thousand and Thirty-three Dollars and Fifty-two Cents ($4,033.52) nor any portion thereof had at that [60] time been nor was at that time so transferred by the said association or any of its officers to the said Assistant United States Treasurer at San Francisco, California, but that, on the contrary, the said sum last above mentioned still remained on deposit in said First National Bank of Juneau to the credit of the Treasurer of the United States, and at such time there remained on deposit with said association to the credit of the Treasurer of the United States and the various disbursing officers of the United States a sum greater than One Hundred and Fifty Thousand Dollars ($150,000), to wit, the sum of One Hundred and Ninety-four Thousand and Ninety-one Dollars

and Forty-three Cents ($194,091.43), as he, the said C. M. Summers, President, and he, the said Stewart G. Holt, Cashier, as aforesaid, then and there when so making said entry well knew, and the said false entry was then and there so made as aforesaid with the intent then and there on the part of him, the said C. M. Summers, and him, the said Stewart G. Holt, to injure and defraud said association and certain persons to the Grand Jury unknown, and to deceive any officer of the said association and the Comptroller of the Currency and any agent appointed by said Comptroller of the Currency to examine the affairs of said association, contrary to the form of the Statutes in such case made and provided, and against the peace and dignity of the United States. **[61]**

COUNT TWENTY-ONE.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that heretofore, to wit, on the 8th day of May, A. D. 1911, in the town of Juneau, in Division Number One, District of Alaska, and within the jurisdiction of this court, said C. M. Summers and said Stewart G. Holt, he, the said C. M. Summers, being then and there the President, and he, the said Stewart G. Holt, being then and there the Cashier, of a certain national banking association then and there known and designated as First National Bank of Juneau, which said association theretofore had been duly organized and established and was then existing and doing business at the said town of Juneau, in the Division and District aforesaid, under the laws of the United States pertaining to national banking associations, did then and there

wilfully, unlawfully, fraudulently and wrongfully make in a certain book then and there belonging to and in use by the said association in transacting its said banking business and in keeping its accounts and then and there designated and known as "Journal D–A," on page 183 thereof, a certain false entry to the effect that on that date the sum of Three Thousand Seven Hundred and Fifty-two Dollars and Forty-one Cents ($3,752.41) [62] was transferred by said association to the Assistant United States Treasurer at San Francisco, California, out of the funds and deposits with said association to the credit of the Treasurer of the United States, which entry was made as a debit item of a certain account known and designated as "Treasurer United States," and which entry was then and there in words and figures as follows, to wit:

"Treasurer United States.

Transfer Excess Dep. Asst. Treas.

U. S...... .. ..3,752.41"

and which said entry so as aforesaid made in said book then and there purporting to show and did in substance and effect indicate and declare that the sum of Three Thousand Seven Hundred and Fifty-two Dollars and Forty-one Cents ($3,752.41) was then and there transferred and paid over by the said First National Bank of Juneau to the Assistant United States Treasurer at San Francisco, California, out of the funds on deposit in and with said association to the credit of the Treasurer of the United States, and that at the close of business hours on said day there remained in said First National

Bank of Juneau to the credit of the Treasurer of the United States and the various disbursing officers of the United States no more than One Hundred and Fifty Thousand Dollars ($150,000);

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said entry so made as aforesaid was then and there wholly false in this, that neither said sum of Three Thousand Seven Hundred and Fifty-two Dollars and Forty-one Cents ($3,752.41) [63] nor any portion thereof had at that time been nor was at that time so transferred by the said association or any of its officers to the said Assistant United States Treasurer at San Francisco, California, but that, on the contrary, the said sum last above mentioned still remained on deposit in said First National Bank of Juneau to the credit of the Treasurer of the United States, and at such time there remained on deposit with said association to the credit of the Treasurer of the United States and the various disbursing officers of the United States a sum greater than One Hundred and Fifty Thousand Dollars ($150,000), to wit, the sum of One Hundred and Ninety-seven Thousand Eight Hundred and Forty-three Dollars and Eighty-four Cents ($197,843.84), as he, the said C. M. Summers, President, and he, the said Stewart G. Holt, Cashier, as aforesaid, then and there when so making said entry well knew and the said false entry was then and there so made as aforesaid with the intent then and there on the part of him, the said C. M. Summers, and him, the said Stewart G. Holt, to injure and defraud said association and certain persons to the Grand Jury unknown, and to

deceive any officer of said association and the Comptroller of the Currency and any agent appointed by said Comptroller of the Currency to examine the affairs of said association, contrary to the form of the Statutes in such case made and provided, and against the peace and dignity of the United States. **[64]**

COUNT TWENTY-TWO.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that heretofore, to wit, on the 31st day of May, A. D. 1911, in the town of Juneau, in Division Number One, District of Alaska, and within the jurisdiction of this court, said C. M. Summers, and said Stewart G. Holt, he, the said C. M. Summers being then and there the President, and he, the said Stewart G. Holt, being then and there the Cashier, of a certain national banking association then and there known and designated as First National Bank of Juneau, which said association theretofore had been duly organized and established and was then existing and doing business at the said town of Juneau, in the Division and District aforesaid, under the laws of the United States pertaining to national banking associations, did then and there wilfully, unlawfully, fraudulently and wrongfully make in a certain book then and there belonging to and in use by the said association in transacting its said banking business and in keeping its accounts and then and there designated and know as "Journal D–A," on page 197 thereof, a certain false entry to the effect that on that date the sum of Six Thousand Nine Hundred and Fifty-eight Dollars and Fifty-three Cents ($6,958.53) was transferred by

said association to the Assistant [65] United States Treasurer at San Francisco, California, out of the funds and deposits with said association to the credit of the Treasurer of the United States, which entry was made as a debit item of a certain account known and designated as "Treasurer United States," and which entry was then and there in words and figures as follows, to wit:

"Treasurer United States.

Transfer Excess Deposits to Asst.

Treas. U. S. at San Francisco....6,958.53"

and which said entry so as aforesaid made in said book then and there purporting to show and did in substance and effect indicate and declare that the sum of Six Thousand Nine Hundred and Fifty-eight Dollars and Fifty-three Cents ($6,958.53) was then and there transferred and paid over by the said First National Bank of Juneau to the Assistant United States Treasurer at San Francisco, California, out of the funds on deposit in and with said association to the credit of the Treasurer of the United States, and that at the close of business hours on said day there remained in said First National Bank of Juneau to the credit of the Treasurer of the United States and the various disbursing officers of the United States no more than One Hundred and Fifty Thousand Dollars ($150,000);

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said entry so made as aforesaid was then and there wholly false in this, that neither said sum of Six Thousand Nine Hundred and Fifty-eight Dollars and Fifty-three

Cents ($6,958.53) [66] nor any portion thereof had at that time been nor was at that time so transferred by the said association or any of its officers to the said Assistant United States Treasurer at San Francisco, California, but that, on the contrary, the said sum last above mentioned still remained on deposit in said First National Bank of Juneau, to the credit of the Treasurer of the United States, and at such time there remained on deposit with said association to the credit of the Treasurer of the United States and the various disbursing officers of the United States a sum greater than One Hundred and Fifty Thousand Dollars ($150,000), to wit, the sum of One Hundred and Ninety-four Thousand Four Hundred and Ninety Dollars and Fifty-two Cents ($194,490.52), as he, the said C. M. Summers, President, and he the said Stewart G. Holt, Cashier, as aforesaid, then and there when so making said entry well knew, and the said false entry was then and there so made as aforesaid with the intent then and there on the part of him, the said C. M. Summers, and him, the said Stewart G. Holt, to injure and defraud said association and certain persons to the Grand Jury unknown, and to deceive any officer of the said association and the Comptroller of the Currency, and any agent appointed by said Comptroller of the Currency to examine the affairs of said association, contrary to the form of the Statutes in such case made and provided, and against the peace and dignity of the United States. [67]

COUNT TWENTY-THREE.

And the Grand Jurors aforesaid, upon their oaths

aforesaid, do further present that heretofore, to wit, on the 3d day of June, A. D. 1911, in the town of Juneau, in Division Number One, District of Alaska, and within the jurisdiction of this court, said C. M. Summers and said Stewart G. Holt, he, the said C. M. Summers, being then and there the President, and he, the said Stewart G. Holt, being then and there the Cashier, of a certain national banking association then and there known and designated as First National Bank of Juneau, which said association theretofore had been duly organized and established and was then existing and doing business at the said town of Juneau, in the Division and District aforesaid, under the laws of the United States pertaining to national banking associations, did then and there wilfully, unlawfully, fraudulently and wrongfully make in a certain book then and there belonging to and in use by the said association in transacting its said banking business and in keeping its accounts and then and there designated and known as "Journal D–A," on page 199 thereof, a certain false entry to the effect that on that date the sum of Ten Thousand Nine Hundred and Ninety-eight Dollars and Thirty-two Cents ($10,998.32) was transferred by said association to the Assistant United States Treasurer at San Francisco, [68] California, out of the funds and deposits with said association to the credit of the Treasurer of the United States, which entry was made as a debit item of a certain account known and designated as "Treasurer United States," and which entry was then and there in words and figures as follows, to wit:

"Treas. U. S.

Transfer Excess Deposits to Asst.

Treas. U. S. at San Francisco...10,998.32"

and which said entry so as aforesaid made in said book then and there purporting to show and did in substance and effect indicate and declare that the sum of Ten Thousand Nine Hundred and Ninety-eight Dollars and Thirty-two Cents ($10,998.32) was then and there transferred and paid over by the said First National Bank of Juneau to the Assistant United States Treasurer at San Francisco, California, out of the funds on deposit in and with said association to the credit of the Treasurer of the United States, and that at the close of business hours on said day there remained in said First National Bank of Juneau to the credit of the Treasurer of the United States and the various disbursing officers of the United States no more than One Hundred and Fifty Thousand Dollars ($150,000);

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said entry so made as aforesaid was then and there wholly false in this, that neither said sum of Ten Thousand Nine Hundred and Ninety-eight Dollars and Thirty-two Cents ($10,998.32) [69] nor any portion thereof had at that time been nor was at that time so transferred by the said association or any of its officers to the said Assistant United States Treasurer at San Francisco, California, but that, on the contrary, the said sum last above mentioned still remained on deposit in said First National Bank of Juneau to the credit of the Treasurer of the United States, and at

such time there remained on deposit with said association to the credit of the United States and the various disbursing officers of the United States a sum greater than One Hundred and Fifty Thousand Dollars ($150,000), to wit, the sum of Two Hundred and Seven Thousand Nine Hundred and Forty-six Dollars and Nine Cents ($207,946.09), as he, the said C. M. Summers, President, and he, the said Stewart G. Holt, Cashier as aforesaid, then and there when so making said entry well knew, and the said false entry was then and there so made as aforesaid with the intent then and there on the part of him, the said C. M. Summers, and him, the said Stewart G. Holt, to injure and defraud said association and certain persons to the Grand Jury unknown, and to deceive any officer of the said association and the Comptroller of the Currency and any agent appointed by said Comptroller of the Currency to examine the affairs of said association, contrary to the form of the Statutes in such case made and provided, and against the peace and dignity of the United States. [70]

COUNT TWENTY-FOUR.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that heretofore, to wit, on the 29th day of June, A. D. 1911, in the town of Juneau, in Division Number One, District of Alaska, and within the jurisdiction of this court, said C. M. Summers and said Stewart G. Holt, he, the said C. M. Summers, being then and there the President, and he, the said Stewart G. Holt, being then and there the Cashier, of a certain national banking association then and there known and des-

ignated as First National Bank of Juneau, which said association theretofore had been duly organized and established and was then existing and doing business at the said town of Juneau, in the Division and District aforesaid, under the laws of the United States pertaining to national banking associations, did then and there wilfully, unlawfully, fraudulently and wrongfully make in a certain book then and there belonging to and in use by the said association in transacting its said banking business and in keeping its accounts and then and there designated and known as "Journal D–A," on page 219 thereof, a certain false entry to the effect that on that date the sum of Seven Thousand Two Hundred and Forty-nine Dollars and Sixty Cents ($7,249.60) was transferred by said association to the Assistant United States [71] Treasurer at San Francisco, California, out of the funds and deposits with said association to the credit of the Treasurer of the United States, which entry was made as a debit item of a certain account known and designated as "Treasurer United States," and which entry was then and there in words and figures as follows, to-wit:

"Treasurer United States.

Transfer Excess Deposits to Asst.

Treas. U. S. at San Francisco....7,249.60"

and which said entry so as aforesaid made in said book then and there purporting to show and did in substance and effect indicate and declare that the sum of Seven Thousand Two Hundred and Forty-nine Dollars and Sixty Cents ($7,249.60) was

then and there transferred and paid over by the said First National Bank of Juneau to the Assistant United States Treasurer at San Francisco, California, out of the funds on deposit in and with said association to the credit of the Treasurer of the United States, and that at the close of business hours on said day there remained in said First National Bank of Juneau to the credit of the Treasurer of the United States and the various disbursing officers of the United States no more than One Hundred and Fifty Thousand Dollars ($150,000);

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said entry so made as aforesaid was then and there wholly false in this, that neither said sum of Seven Thousand Two Hundred and Forty-nine Dollars and Sixty Cents ($7,249.60), **[72]** nor any portion thereof had at that time been nor was at that time so transferred by the said association or any of its officers to the said Assistant United States Treasurer at San Francisco, California, but that, on the contrary, the said sum last above mentioned still remained on deposit in said First National Bank of Juneau to the credit of the Treasurer of the United States, and at such time there remained on deposit with said association to the credit of the Treasurer of the United States and the various disbursing officers of the United States a sum greater than One Hundred and Fifty Thousand Dollars ($150,000), to wit, the sum of Two Hundred and Fourteen Thousand Seven Hundred and Forty-one Dollars and Thirty-one Cents ($214,741.31), as he, the said C. M. Summers,

President, and he, the said Stewart G. Holt, Cashier, as aforesaid, then and there when so making said entry well knew, and the said false entry was then and there so made as aforesaid with the intent then and there on the part of him, the said C. M. Summers, and him, the said Stewart G. Holt, to injure and defraud said association and certain persons to the Grand Jury unknown, and to deceive any officer of the said association and the Comptroller of the Currency and any agent appointed by said Comptroller of the Currency to examine the affairs of said association, contrary to the form of the Statutes in such case made and provided, and against the peace and dignity of the United States.
[73]

COUNT TWENTY-FIVE.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that heretofore, to wit, on the 30th day of June, A. D. 1911, in the town of Juneau, in Division Number One, District of Alaska, and within the jurisdiction of this court, said C. M. Summers and said Stewart G. Holt, he, the said C. M. Summers, being then and there the President, and he, the said Stewart G. Holt, being then and there the Cashier, of a certain national banking association then and there known and designated as First National Bank of Juneau, which said association theretofore had been duly organized and established and was then existing and doing business at the said town of Juneau, in the Division and District aforesaid, under the laws of the United States pertaining to national banking associations, did then

and there wilfully, unlawfully, fraudulently and wrongfully make in a certain book then and there belonging to and in use by the said association in transacting its said banking business and in keeping its accounts and then and there designated and known as "Journal D-A," on page 219 thereof, a certain false entry to the effect that on that date the sum of Eleven Thousand Four Hundred and Nineteen Dollars and Seventy-six Cents ($11,419.76) was transferred by said [74] association to the Assistant United States Treasurer at San Francisco, California, out of the funds and deposits with said association to the credit of the Treasurer of the United States, which entry was made as a debit item of a certain account known and designated as "Treasurer United States," and which entry was then and there in words and figures as follows, to wit:

"Treasurer United States.

Transfer Excess Deposits to Asst.

Treas. U. S. at San Francisco...11,419.76"

and which said entry so as aforesaid made in said book then and there purporting to show and did in substance and effect indicate and declare that the sum of Eleven Thousand Four Hundred and Nineteen Dollars and Seventy-six Cents ($11,419.76) was then and there transferred and paid over by the said First National Bank of Juneau to the Assistant United States Treasurer at San Francisco, California, out of the funds on deposit in and with said association to the credit of the Treasurer of the United States, and that at the close of business hours on said day there remained in said First Na-

tional Bank of Juneau to the credit of the Treasurer of the United States and the various disbursing officers of the United States no more than One Hundred and Fifty Thousand Dollars ($150,000);

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said entry so made as aforesaid was then and there wholly false in this, that neither said sum of Eleven Thousand Four Hundred **[75]** and Nineteen Dollars and Seventy-six Cents ($11,419.76) nor any portion thereof had at that time been nor was at that time so transferred by the said association or any of its officers to the said Assistant United States Treasurer at San Francisco, California, but that, on the contrary, the said sum last above mentioned still remained on deposit in said First National Bank of Juneau to the credit of the Treasurer of the United States, and at such time there remained on deposit with said association to the credit of the Treasurer of the United States and the various disbursing officers of the United States a sum greater than One Hundred and Fifty Thousand Dollars ($150,000), to wit, the sum of Two Hundred and Twenty-five Thousand One Hundred and Sixty-one Dollars and Seven Cents ($225,161.07), as he, the said C. M. Summers, President, and he, the said Stewart G. Holt, Cashier, as aforesaid, then and there when so making said entry well knew, and the said false entry was then and there so made as aforesaid with the intent then and there on the part of him, the said C. M. Summers, and him, the said Stewart G. Holt, to injure and defraud said association and certain per-

sons to the Grand Jury unknown, and to deceive any officer of the said association and the Comptroller of the Currency and any agent appointed by said Comptroller of the Currency to examine the affairs of said association, contrary to the form of the Statutes in such case made and provided, and against the peace and dignity of the United States. **[76]**

COUNT TWENTY-SIX.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said C. M. Summers and the said Stewart G. Holt, heretofore, to wit, on the 19th day of May, A. D. 1909, in the town of Juneau, in the Division and District aforesaid, and within the jurisdiction of this court, the said C. M. Summers being then and there the President, and the said Stewart G. Holt being then and there the Cashier, of a certain national banking association known and designated as First National Bank of Juneau, and which said First National Bank of Juneau was theretofore established and then and there existing and doing business as a national banking association under and by virtue of the laws of the United States respecting national banking associations, did then and there wilfully, unlawfully, wrongfully and fraudulently make, in a certain report of the condition of the affairs of the said association at the close of business on a certain day, to wit, on the 28th day of April, A. D. 1909, which said report was then and there made to the Comptroller of the Currency in accordance with the provisions of Section 5211 of the Revised Statutes of the United States, a certain false entry under the

head of "Liabilities," the same being known and designated as Item No. 17 of Liabilities in said report, which said entry was made as aforesaid in said report in the words and figures following, to wit:

"United States Deposits........33,219.14"

[77]

and which said entry so made as aforesaid then and there purporting to show and did in substance and effect declare that the amount of the United States Deposits then and there in the said First National Bank of Juneau, exclusive of the amount then and there on deposit to the credit of the various disbursing officers of the United States, was the sum of Thirty-three Thousand Two Hundred and Nineteen Dollars and Fourteen Cents ($33,219.14), and no more;

And the Grand Jurors aforesaid further state that said entry so made as aforesaid was false, in this, to wit, that the amount of United States Deposits then and there in said bank at the close of business on the said 28th day of April, A. D. 1909, exclusive of the sums and amounts then and there to the credit of the various disbursing officers of the United States, was not in the sum last aforesaid, but in a different and much greater sum, to wit, in the sum of Sixty-nine Thousand Two Hundred and Nineteen Dollars, and Thirteen Cents ($69,219.13), he, the said C. M. Summers, President as aforesaid, and he, the said Stewart G. Holt, Cashier as aforesaid, then and there at the time and place of so making said false entry in said report, as aforesaid, well knowing the said entry to be then and there false, as aforesaid, and thereby in-

tending and designing to injure and defraud the said association and certain persons to the Grand Jury unknown, and to deceive any officer of said association and the Comptroller of the Currency and any agent appointed by said Comptroller of the Currency to examine the affairs of said association, contrary to the form of the Statutes in such case made and provided, and against the peace and dignity of the United States. [78]

COUNT TWENTY-SEVEN.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said C. M. Summers and the said Stewart G. Holt, heretofore, to wit, on the 9th day of May, A. D. 1910, in the town of Juneau, in the Division and District aforesaid, and within the jurisdiction of this court, the said C. M. Summers being then and there the President, and the said Stewart G. Holt being then and there the Cashier, of a certain national banking association known and designated as First National Bank of Juneau, and which said First National Bank of Juneau was theretofore established and then and there existing and doing business as a national banking association under and by virtue of the laws of the United States respecting national banking associations, did then and there willfully, unlawfully, wrongfully and fraudulently make, in a certain report of the condition of the affairs of the said association at the close of business on a certain day, to wit, on the 29th day of March, A. D. 1910, which said report was then and there made to the Comptroller of the Currency in accordance with the provisions of Section 5211 of the

Revised Statutes of the United States, a certain false entry under the head of "Liabilities," the same being known and designated as Item No. 16 of Liabilities in said report, which said entry was made as aforesaid in said report in the words and figures following, to wit:

"United States Deposits........49,251.42"

[79]

and which said entry was so made as aforesaid then and there purported to show and did in substance and effect declare that the amount of the United States Deposits then and there in the said First National Bank of Juneau, exclusive of the amount then and there on deposit to the credit of the various disbursing officers of the United States, was the sum of Forty-nine Thousand Two Hundred and Fifty-one Dollars and Forty-two Cents ($49,251.42), and no more;

And the Grand Jurors aforesaid further state that said entry so made as aforesaid was false, in this, to wit, that the amount of United States Deposits then and there in said bank at the close of business on the said 29th day of March, A. D. 1910, exclusive of the sums and amounts then and there to the credit of the various disbursing officers of the United States, was not in the sum last aforesaid, but in a different and much greater sum, to wit, in the sum of One Hundred and Eleven Thousand Four Hundred and Sixty-eight Dollars and Ten Cents ($111,468.10), he, the said C. M. Summers, President as aforesaid, and he, the said Stewart G. Holt, Cashier as aforesaid, then and there at the time and place of so making

said false entry in said report, as aforesaid, well knowing the said entry to be then and there false, as aforesaid, and thereby intending and designing to injure and defraud the said association and certain persons to the Grand Jury unknown, and to deceive any officer of said association and the Comptroller of the Currency and any agent appointed by said Comptroller of the Currency to examine the affairs of said association, contrary to the form of the Statutes in such case made and provided, and against the peace and dignity of the United States. [80]

COUNT TWENTY-EIGHT.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said C. M. Summers and the said Stewart G. Holt, heretofore, to wit, on the 15th day of July, A. D. 1910, in the town of Juneau, in the Division and District aforesaid, and within the jurisdiction of this court, the said C. M. Summers being then and there the President, and the said Stewart G. Holt being then and there the Cashier, of a certain national banking association known and designated as First National Bank of Juneau, and which said First National Bank of Juneau was theretofore established and then and there existing and doing business as a national banking association under and by virtue of the laws of the United States respecting national banking associations, did then and there wilfully, unlawfully, wrongfully and fraudulently make, in a certain report of the condition of the affairs of the said association at the close of business on a certain day, to wit, on the 30th day of June, A. D. 1910, which said

report was then and there made to the Comptroller of the Currency in accordance with the provisions of section 5211 of the Revised Statutes of the United States, a certain false entry under the head of "Liabilities," the same being known and designated as Item No. 16 of Liabilities in said report, which said entry was made as aforesaid in said report in the words and figures following, to wit:

"United States Deposits........45,120.83"

[81]

and which said entry so made as aforesaid then and there purported to show and did in substance and effect declare that the amount of the United States Deposits then and there in said First National Bank of Juneau, exclusive of the amount then and there on deposit to the credit of the various disbursing officers of the United States, was the sum of Forty-five Thousand One Hundred and Twenty Dollars and Eighty-three Cents ($45,120.83), and no more;

And the Grand Jurors aforesaid further state that said entry so made as aforesaid was false, in this, to wit, that the amount of United States Deposits then and there in said bank at the close of business on the said 30th day of June, A. D. 1910, exclusive of the sums and amounts then and there to the credit of the various disbursing officers of the United States, was not in the sum last aforesaid, but in a different and much greater sum, to wit, in the sum of Ninety-five Thousand and Ten Dollars and Thirty-seven Cents ($95,010.37), he the said C. M. Summers, President as aforesaid, and he, the said Stewart G. Holt, Cashier as aforesaid, then and there at the time

and place of so making said false entry in said report, as aforesaid, well knowing the said entry to be then and there false, as aforesaid, and thereby intending and designing to injure and defraud the said association and certain persons to the Grand Jury unknown, and to deceive any officer of said association and the Comptroller of the Currency and any agent appointed by said Comptroller of the Currency to examine the affairs of said association, contrary to the form of the Statutes in such case made and provided, and against the peace and dignity of the United States. [82]

COUNT TWENTY-NINE.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said C. M. Summers and the said Stewart G. Holt, heretofore, to wit, on the 19th day of November, A. D. 1910, in the town of Juneau, in the Division and District aforesaid, and within the jurisdiction of this court, the said C. M. Summers being then and there the President, and the said Stewart G. Holt, being then and there the Cashier of a certain national banking association known and designated as First National Bank of Juneau, and which said First National Bank of Juneau was theretofore established and then and there existing and doing business as a national banking association under and by virtue of the laws of the United States respecting national banking associations, did then and there wilfully, unlawfully, wrongfully and fraudulently make, in a certain report of the condition of the affairs of the said association at the close of business on a certain day, to

wit, on the 10th day of November, A. D. 1910, which said report was then and there made to the Comptroller of the Currency in accordance with the provisions of section 5211 of the Revised Statutes of the United States, a certain false entry under the head of "Liabilities," the same being known and designated as Item No. 16 of Liabilities in said report, which said entry was made as aforesaid in said report in the words and figures following, to wit:

"United States Deposits........47,668.52"

[83]

and which said entry so made as aforesaid then and there purported to show and did in substance and effect declare that the amount of the United States Deposits then and there in the said First National Bank of Juneau, exclusive of the amount then and there on deposit to the credit of the various disbursing officers of the United States, was the sum of Forty-seven Thousand Six Hundred and Sixty-eight Dollars and Fifty-two Cents ($47,668.52), and no more;

And the Grand Jurors aforesaid further state that said entry so made as aforesaid was false, in this, to wit, that the amount of United States Deposits then and there in said bank at the close of business on the said 10th day of November, A. D. 1910, exclusive of the sums and amounts then and there to the credit of the various disbursing officers of the United States, was not in the sum last aforesaid, but in a different and much greater sum, to wit, in the sum of One Hundred and Nineteen Thousand Two Hundred and Sixty-three Dollars and Fifty-one

Cents ($119,263.51), he, the said C. M. Summers, President as aforesaid, and he, the said Stewart G. Holt, Cashier as aforesaid, then and there at the time and place of so making said false entry in said report, as aforesaid, well knowing the said entry to be then and there false, as aforesaid, and thereby intending and designing to injure and defraud the said association and certain persons to the Grand Jury unknown, and to deceive any officer of said association and the Comptroller of the Currency and any agent appointed by said Comptroller of the Currency to examine the affairs of said association, contrary to the form of the Statutes in such case made and provided, and against the peace and dignity of the United States. [84]

COUNT THIRTY.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said C. M. Summers and the said Stewart G. Holt, heretofore, to wit, on the 8th day of April, A. D. 1911, in the town of Juneau, in the Division and District aforesaid, and within the jurisdiction of this court, the said C. M. Summers being then and there the President, and the said Stewart G. Holt, being then and there the Cashier of a certain national banking association known and designated as First National Bank of Juneau, and which said First National Bank of Juneau was theretofore established and then and there existing and doing business as a national banking association under and by virtue of the laws of the United States respecting national banking associations, did then and there wilfully, unlawfully, wrong-

fully and fraudulently make, in a certain report of the condition of the affairs of the said association at the close of business on a certain day, to wit, on the 7th day of March, A. D. 1911, which said report was then and there made to the Comptroller of the Currency in accordance with the provisions of section 5211 of the Revised Statutes of the United States, a certain false entry under the head of "Liabilities," the same being known and designated as Item No. 16 of Liabilities in said report, which said entry was made as aforesaid in said report in the words and figures following, to wit:

"United States Deposits........74,887.06"

[85]

and which said entry so made as aforesaid then and there purported to show and did in substance and effect declare that the amount of the United States Deposits then and there in the said First National Bank of Juneau, exclusive of the amount then and there on deposit to the credit of the various disbursing officers of the United States, was the sum of Seventy-four Thousand Eight Hundred and Eighty-seven Dollars and Six Cents ($74,887.06), and no more;

And the Grand Jurors aforesaid further state that said entry so made as aforesaid was false, in this, to wit, that the amount of United States Deposits then and there in said bank at the close of business on the said 7th day of March, A. D. 1911, exclusive of the sums and amounts then and there to the credit of the various disbursing officers of the United States, was not in the sum last aforesaid, but in a

different and much greater sum, to wit, in the sum of One Hundred and Forty-five Thousand Six Hundred and Twenty-seven Dollars and Thirty-nine Cents ($145,627.39), he, the said C. M. Summers, President as aforesaid, and he, the said Stewart G. Holt, Cashier as aforesaid, then and there at the time and place of so making said false entry in said report, as aforesaid, well knowing the said entry to be then and there false, as aforesaid, and thereby intending and designing to injure and defraud the said association and certain persons to the Grand Jury unknown, and to deceive any officer of said association and the Comptroller of the Currency and any agent appointed by said Comptroller of the Currency to examine the affairs of said association, contrary to the form of the Statutes in such case made and provided, and against the peace and dignity of the United States. [86]

COUNT THIRTY-ONE.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said C. M. Summers and the said Stewart G. Holt, heretofore, to wit, on the 19th day of May, A. D. 1909, at the town of Juneau in the Division and District aforesaid, and within the jurisdiction of this court, the said C. M. Summers being then and there the President, and the said Stewart G. Holt, being then and there the Cashier, of a certain national banking association known and designated as First National Bank of Juneau, and which said First National Bank of Juneau was established and then existing and doing business as a national banking association under

and by virtue of the laws of the United States respecting national banks, did then and there wilfully, wrongfully, unlawfully and fraudulently make, in a certain report of the condition of the affairs of the said association at the close of business on a certain date, to wit, on the 28th day of April, A. D. 1909, which said report was then and there made to the Comptroller of the Currency in due form in accordance with the provisions of section 5211 of the Revised Statutes of the United States, a certain false entry under the head of "Resources" in said report, in words and figures as follows, to wit:

"Due from State and Private Banks
and Bankers, Trust Companies
and Savings Banks.............21,306.65"

[87]

the same being known and designated as Item No. 12 of Resources in said report, and which said entry so made as aforesaid then and there purported to show and did in substance and effect declare that the amount due from State and Private Banks and Bankers, Trust Companies and Savings Banks to the said association was in the sum of Twenty-one Thousand Three Hundred and Six Dollars and Sixty-five Cents ($21,306.65), and not less;

And the Grand Jurors further say that said entry so made as aforesaid was false, in this, to wit, that the amount then and there at the close of business on said 28th day of April, A. D. 1909, due said association from State and Private Banks and Bankers, Trust Companies and Savings Banks was not in the sum last aforesaid, but in a different and much

smaller sum, to wit, in the sum of Two Thousand One Hundred and Ninety-two Dollars and Fifty-eight Cents ($2,192.58), and no more, he, the said C. M. Summers, President as aforesaid, and he, the said Stewart G. Holt, Cashier as aforesaid, then and there at the time and place of so making the false entry in said report, as aforesaid, well knowing the said entry to be then and there false, as aforesaid, and thereby intending and designing to injure and defraud the said association and certain persons to the Grand Jury unknown, and to deceive any officer of the said association and the Comptroller of the Currency and any agent appointed by said Comptroller of the Currency to examine the affairs of said association, contrary to the form of the Statutes in such case made and provided, and against the peace and dignity of the United States. **[88]**

COUNT THIRTY-TWO.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said C. M. Summers and the said Stewart G. Holt, heretofore, to wit, on the 9th day of May, A. D. 1910, at the town of Juneau, in the Division and District aforesaid, and within the jurisdiction of this court, the said C. M. Summers being then and there the President, and the said Stewart G. Holt being then and there the Cashier, of a certain national banking association known and designated as First National Bank of Juneau, and which said First National Bank of Juneau was established and then existing and doing business as a national banking association under and by virtue of the laws of the United States respect-

ing national banks, did then and there wilfully, wrongfully, unlawfully and fraudulently make, in a certain report of the condition of the affairs of the said association at the close of business on a certain date, to wit, on the 29th day of March, A. D. 1910, which said report was then and there made to the Comptroller of the Currency in due form in accordance with the provisions of section 5211 of the Revised Statutes of the United States, a certain false entry under the head of "Resources" in said report, in words and figures as follows, to wit:

"Due from State and Private Banks
and Bankers, Trust Companies
and Savings Banks.............9,315.84"

[89]

the same being known and designated as Item No. 12 of Resources in said report, and which said entry so made as aforesaid then and there purported to show and did in substance and effect declare that the amount due from State and Private Banks and Bankers, Trust Companies and Savings Banks to the said association was in the sum of Nine Thousand Three Hundred and Fifteen Dollars and Eighty-four Cents ($9,315.84), and not less;

And the Grand Jurors further say that said entry so made as aforesaid was false, in this, to wit, that the amount then and there at the close of business on said 29th day of March, A. D. 1910, due said association from State and Private Banks and Bankers, Trust Companies and Savings Banks was not in the sum last aforesaid, but in a different and much smaller sum, to wit, in the sum of Two Hundred and

One Dollars and Seventy-seven Cents ($201.77), and no more, he, the said C. M. Summers, President as aforesaid, and he, the said Stewart G. Holt, Cashier as aforesaid, then and there at the time and place of so making the false entry in said report, as aforesaid, well knowing the said entry to be then and there false, as aforesaid, and thereby intending and designing to injure and defraud the said association and certain persons to the Grand Jury unknown, and to deceive any officer of the said association and the Comptroller of the Currency and any agent appointed by said Comptroller of the Currency to examine the affairs of said association, contrary to the form of the Statutes in such case made and provided, and against the peace and dignity of the United States. **[90]**

COUNT THIRTY-THREE.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said C. M. Summers and the said Stewart G. Holt heretofore, to wit, on the 15th day of July, A. D. 1910, at the town of Juneau, in the Division and District aforesaid, and within the jurisdiction of this court, the said C. M. Summers being then and there the President, and the said Stewart G. Holt being then and there the Cashier, of a certain national banking association known and designated as First National Bank of Juneau, and which said First National Bank of Juneau was established and then existing and doing business as a national banking association under and by virtue of the laws of the United States respecting national banks, did then and there wil-

fully, wrongfully, unlawfully and fraudulently make, in a certain report of the condition of the affairs of the said association at the close of business on a certain date, to wit, on the 30th day of June, A. D. 1910, which said report was then and there made to the Comptroller of the Currency in due form in accordance with the provisions of Section 5211 of the Revised Statutes of the United States, a certain false entry under the head of "Resources" in said report, in words and figures as follows, to wit:

"Due from State and Private Banks
and Bankers, Trust Companies
and Savings Banks..............9,470.97"

[91]

the same being known and designated as Item No. 12 of Resources in said report, and which said entry so made as aforesaid then and there purported to show and did in substance and effect declare that the amount due from State and Private Banks and Bankers, Trust Companies and Savings Banks to the said association was in the sum of Nine Thousand Four Hundred and Seventy Dollars and Ninety-seven Cents ($9,470.97), and not less;

And the Grand Jurors further say that said entry so made as aforesaid was false, in this, to wit, that the amount then and there at the close of business on said 30th day of June, A. D. 1910, due said association from State and Private Banks and Bankers, Trust Companies and Savings Banks was not in the sum last aforesaid, but in a different and much smaller sum, to wit, in the sum of Three Hundred and Fifty-six Dollars and Ninety Cents ($356.90),

and no more, he, the said C. M. Summers, President as aforesaid, and he, the said Stewart G. Holt, Cashier as aforesaid, then and there at the time and place of so making the false entry in said report, as aforesaid, well knowing the said entry to be then and there false, as aforesaid, and thereby intending and designing to injure and defraud the said association and certain persons to the Grand Jury unknown, and to deceive any officer of the said association and the Comptroller of the Currency and any agent appointed by said Comptroller of the Currency to examine the affairs of said association, contrary to the form of the Statutes in such case made and provided, and against the peace and dignity of the United States. **[92]**

COUNT THIRTY-FOUR.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said C. M. Summers and the said Stewart G. Holt heretofore, to wit, on the 19th day of November, A. D. 1910, at the town of Juneau, in the Division and District aforesaid, and within the jurisdiction of this court, the said C. M. Summers being then and there the President, and the said Stewart G. Holt being then and there the Cashier, of a certain national banking association known and designated as First National Bank of Juneau, and which said First National Bank of Juneau was established and then existing and doing business as a national banking association under and by virtue of the laws of the United States respecting national banks, did then and there wilfully, wrongfully, unlawfully and fraudulently

make, in a certain report of the condition of the affairs of the said association at the close of business on a certain date, to wit, on the 10th day of November, A. D. 1910, which said report was then and there made to the Comptroller of the Currency in due form in accordance with the provisions of section 5211 of the Revised Statutes of the United States, a certain false entry under the head of "Resources" in said report, in words and figures as follows, to wit:

"Due from State and Private Banks
and Bankers, Trust Companies
and Savings Banks..............28,074.73"

[93]

the same being known and designated at Item No. 12 of Resources in said report, and which said entry so made as aforesaid then and there purported to show and did in substance and effect declare that the amount due from State and Private Banks and Bankers, Trust Companies and Savings Banks to the said association was in the sum of Twenty-eight Thousand and Seventy-four Dollars and Seventy-three Cents ($28,074.73), and not less;

And the Grand Jurors further say that said entry so made as aforesaid was false, in this, to wit, that the amount then and there, at the close of business on the said 10th day of November, A. D. 1910, due said association from State and Private Banks and Bankers, Trust Companies and Savings Banks was not in the sum last aforesaid, but in a different and much smaller sum, to wit, in the sum of Ten Thousand Seven Hundred and Sixty-two Dollars and Eleven Cents ($10,762.11), and no more, he, the said

C. M. Summers, President as aforesaid, and he, the said Stewart G. Holt, Cashier as aforesaid, then and there at the time and place of so making the false entry in said report, as aforesaid, well knowing the said entry to be then and there false, as aforesaid, and thereby intending and designing to injure and defraud the said association and certain persons to the Grand Jury unknown, and to deceive any officer of the said association and the Comptroller of the Currency and any agent appointed by said Comptroller of the Currency to examine the affairs of said association, contrary to the form of the Statutes in such case made and provided, and against the peace and dignity of the United States. **[94]**

COUNT THIRTY-FIVE.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said C. M. Summers and the said Stewart G. Holt, heretofore, to wit, on the 8th day of April, A. D. 1911, at the town of Juneau, in the Division and District aforesaid, and within the jurisdiction of this court, the said C. M. Summers being then and there the President, and the said Stewart G. Holt being then and there the Cashier, of a certain national banking association known and designated as First National Bank of Juneau, and which said First National Bank of Juneau was established and then existing and doing business as a national banking association under and by virtue of the laws of the United States respecting national banks, did then and there wilfully, wrongfully, unlawfully and fraudulently made, in a certain report of the condition of the affairs of

the said association at the close of business on a certain date, to wit, on the 7th day of March, A. D. 1911, which said report was then and there made to the Comptroller of the Currency in due form in accordance with the provisions of Section 5211 of the Revised Statutes of the United States, a certain false entry under the head of "Resources" in said report, in words and figures as follows, to wit:

"Due from State and Private Banks
and Bankers, Trust Companies
and Savings Banks.............38,329.25"

[95]

the same being known and designated as Item No. 12 of Resources in said report, and which said entry so made as aforesaid then and there purported to show and did in substance and effect declare that the amount due from State and Private Banks and Bankers, Trust Companies and Savings Banks to the said association was in the sum of Thirty-eight Thousand Three Hundred and Twenty-nine Dollars and Twenty-five Cents ($38,329.25), and not less;

And the Grand Jurors further say that said entry so made as aforesaid was false in this, to wit, that the amount then and there at the close of business on the said 7th day of March, A. D. 1911, due said association from State and Private Banks and Bankers, Trust Companies and Savings Banks was not in the sum last aforesaid, but in a different and much smaller sum, to wit, in the sum of Nineteen Thousand Two Hundred and Fifteen Dollars and Eighteen Cents ($19,215.18), and no more, he, the said C. M. Summers, President as aforesaid, and he, the

said Stewart G. Holt, Cashier as aforesaid, then and there at the time and place of so making the false entry in said report, as aforesaid, well knowing the said entry to be then and there false, as aforesaid, and thereby intending and designing to injure and defraud the said association and certain persons to the Grand Jury unknown, and to deceive any officer of the said association and the Comptroller of the Currency and any agent appointed by said Comptroller of the Currency to examine the affairs of said association, contrary to the form of the Statutes in such case made and provided, and against the peace and dignity of the United States. **[96]**

COUNT THIRTY-SIX.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said C. M. Summers and the said Stewart G. Holt heretofore, to wit, on the 9th day of May, A. D. 1910, at the town of Juneau, in the Division and District aforesaid, and within the jurisdiction of this court, the said C. M. Summers being then and there the President, and the said Stewart G. Holt being then and there the Cashier of a certain national banking association known and designated as First National Bank of Juneau, and which said First National Bank of Juneau was theretofore established and then and there existing and doing business as a national banking association under and by virtue of the laws of the United States respecting national banks, did then and there wilfully, wrongfully, unlawfully and fraudulently make, in a certain report of the condition of the affairs of the said association at the close

of business on a certain date, to wit, on the 29th day of March, A. D. 1910, which said report was then and there made to the Comptroller of the Currency in due form in accordance with the provisions of Section 5211 of the Revised Statutes of the United States, a certain false entry under the head of "Resources" in said report, in words and figures as follows, to wit:

"Due from National Banks (not approved reserve agents).........22,212.29"

[97]

the same being known and designated as Item No. 11 of Resources in said report, and which said entry so made as aforesaid then and there purported to show and did in substance and effect declare that the amount due from National Banks (not approved reserve agents) to the said First National Bank of Juneau was the sum of Twenty-two Thousand Two Hundred and Twelve Dollars and Twenty-nine Cents ($22,212.29), and not less;

And the Grand Jurors further say that said entry so made as aforesaid was false, in this, to wit, that the amount then and there, at the close of business on said 29th day of March, A. D. 1910, due to said association from National Banks (not approved reserve agents) was not in the sum last aforesaid, but a different and much smaller sum, to wit, the sum of Twelve Thousand Two Hundred and Twelve Dollars and Twenty-nine Cents ($12,212.29) and no more, he, the said C. M. Summers, President as aforesaid, and he, the said Stewart G. Holt, Cashier as aforesaid, then and there at the time of so making

the said false entry in said report, as aforesaid, well knowing the said entry to be then and there false, as aforesaid, and thereby intending and designing to injure and defraud the said association and certain persons to the Grand Jury unknown, and to deceive any officer of said association and the Comptroller of the Currency and any agent appointed by said Comptroller of the Currency to examine the affairs of said association, contrary to the form of the statutes in such case made and provided, and against the peace and dignity of the United States. **[98]**

COUNT THIRTY-SEVEN.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said C. M. Summers and the said Stewart G. Holt heretofore, to wit, on the 15th day of July, A. D. 1910, at the town of Juneau, in the Division and District aforesaid, and within the jurisdiction of this court, the said C. M. Summers being then and there the President, and the said Stewart G. Holt being then and there the Cashier, of a certain national banking association known and designated as First National Bank of Juneau, and which said First National Bank of Juneau was theretofore established and then and there existing and doing business as a national banking association under and by virtue of the laws of the United States respecting national banks, did then and there wilfully, wrongfully, unlawfully and fraudulently make, in a certain report of the condition of the affairs of the said association at the close of business on a certain date, to wit, on the 30th day of June, A. D. 1910, which said report was then and

there made to the Comptroller of the Currency in due form in accordance with the provisions of Section 5211 of the Revised Statutes of the United States, a certain false entry under the head of "Resources" in said report, in words and figures as follows, to wit:

"Due from National Banks (not approved reserve agents).........19,605.06"

[99]

the same being known and designated as Item No. 11 of Resources in said report, and which said entry so made as aforesaid then and there purported to show and did in substance and effect declare that the amount due from National Banks (not approved reserve agents) to the said First National Bank of Juneau was the sum of Nineteen Thousand Six Hundred and Five Dollars and Six Cents ($19,605.06, and not less;

And the Grand Jurors further say that said entry so made as aforesaid was false, in this, to wit, that the amount then and there, at the close of business on the said 30th day of June, A. D. 1910, due to said association from National Banks (not approved reserve agents) was not in the sum last aforesaid, but a different and much smaller sum, to wit, the sum of Ten Thousand One Hundred and Ninety-three Dollars and Eighty-nine Cents ($10,193.89), and no more, he, the said C. M. Summers, President as aforesaid, and he, the said Stewart G. Holt, Cashier as aforesaid, then and there at the time of so making the said false entry in said report, as aforesaid, well knowing the said entry to be then and there false,

as aforesaid, and thereby intending and designing to injure and defraud the said association and certain persons to the Grand Jury unknown, and to deceive any officer of said association and the Comptroller of the Currency and any agent appointed by said Comptroller of the Currency to examine the affairs of said association, contrary to the form of the Statutes in such case made and provided, and against the peace and dignity of the United States. **[100]**

COUNT THIRTY-EIGHT.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said C. M. Summers and the said Stewart G. Holt heretofore, to wit, on the 19th day of November, A. D. 1910, at the town of Juneau, in the Division and District aforesaid, and within the jurisdiction of this court, the said C. M. Summers being then and there the President, and the said Stewart G. Holt being then and there the Cashier, of a certain national banking association known and designated as First National Bank of Juneau, and which said First National Bank of Juneau was theretofore established and then and there existing and doing business as a national banking association under and by virtue of the laws of the United States respecting national banks, did then and there wilfully, wrongfully, unlawfully and fraudulently make, in a certain report of the condition of the affairs of the said association at the close of business on a certain date, to wit, on the 10th day of November, A. D. 1910, which said report was then and there made to the Comptroller of the Currency

in due form in accordance with the provisions of section 5211 of the Revised Statutes of the United States, a certain false entry under the head of "Resources" in said report, in words and figures as follows, to wit:

"Due from National Banks (not approved reserve agents).........21,976.79"

[101]

the same being known and designated as Item No. 11 of Resources in said report, and which said entry so made as aforesaid then and there purported to show and did in substance and effect declare that the amount due from National Bank (not approved reserve agents) to the said First National Bank of Juneau was the sum of Twenty-one Thousand Nine Hundred and Seventy-six Dollars and Seventy-nine Cents ($21,976.79), and not less;

And the Grand Jurors further say that said entry so made as aforesaid was false, in this, to wit, that the amount then and there, at the close of business on said 10th day of November, A. D. 1910, due to said association from National Banks (not approved reserve agents) was not in the sum last aforesaid, but a different and much smaller sum, to wit, the sum of Eleven Thousand Nine Hundred and Seventy-six Dollars and Seventy-nine Cents ($11,976.79), and no more, he, the said C. M. Summers, President as aforesaid, and he, the said Stewart G. Holt, Cashier as aforesaid, then and there at the time of so making the said false entry in said report, as aforesaid, well knowing the said entry to be then and there false, as aforesaid, and thereby intending and design-

ing to injure and defraud the said association and certain persons to the Grand Jury unknown, and to deceive any officer of said association and the Comptroller of the Currency and any agent appointed by said Comptroller of the Currency to examine the affairs of said association, contrary to the form of the statutes in such case made and provided, and against the peace and dignity of the United States. **[102]**

COUNT THIRTY-NINE.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said C. M. Summers and the said Stewart G. Holt heretofore, to wit, on the 8th day of April, A. D. 1911, at the town of Juneau, in the Division and District aforesaid, and within the jurisdiction of this court, the said C. M. Summers being then and there the President, and the said Stewart G. Holt, being then and there the Cashier, of a certain national banking association known and designated as First National Bank of Juneau, and which said First National Bank of Juneau was theretofore established and then and there existing and doing business as a national banking association under and by virtue of the laws of the United States respecting national banks, did then and there wilfully, wrongfully, unlawfully and fraudulently make, in a certain report of the condition of the affairs of the said association at the close of business on a certain date, to wit, on the 7th day of March, A. D. 1911, which said report was then and there made to the Comptroller of the Currency in due form in accordance with the provisions of section 5211 of the Revised Statutes of the United

States, a certain false entry under the head of "Resources" in said report, in words and figures as follows, to wit:

"Due from National Banks (not approved reserve agents).........14,962.57"

[103]

the same being known and designated as Item No. 11 of Resources in said report, and which said entry so made as aforesaid then and there purported to show and did in substance and effect declare that the amount due from National Banks (not approved reserve agents) to the said First National Bank of Juneau was the sum of Fourteen Thousand Nine Hundred and Sixty-two Dollars and Fifty-seven Cents ($14,962.57), and not less;

And the Grand Jurors further say that said entry so made as aforesaid was false, in this, to wit, that the amount then and there, at the close of business on said 7th day of March, A. D. 1911, due to said association from National Banks (not approved reserve agents) was not in the sum last aforesaid, but a different and much smaller sum, to wit, the sum of Four Thousand Nine Hundred and Sixty-two Dollars and Fifty-seven Cents ($4,962.57), and no more, he, the said C. M. Summers, President as aforesaid, and he, the said Stewart G. Holt, Cashier as aforesaid, then and there at the time of so making the said false entry in said report, as aforesaid, well knowing the said entry to be then and there false, as aforesaid, and thereby intending and designing to injure and defraud the said association and certain persons to the Grand Jury unknown, and to

deceive any officer of said association and the Comptroller of the Currency and any agent appointed by said Comptroller of the Currency to examine the affairs of said association, contrary to the form of the statutes in such case made and provided, and against the peace and dignity of the United States. [104]

COUNT FORTY.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said C. M. Summers and the said Stewart G. Holt, heretofore, to wit, on the 19th day of May, A. D. 1909, at the town of Juneau, in the Division and District aforesaid, and within the jurisdiction of this court, the said C. M. Summers being then and there the President, and the said Stewart G. Holt being then and there the Cashier, of a certain national banking association known and designated as First National Bank of Juneau, and which said First National Bank of Juneau was theretofore established and then and there existing and doing business as a national banking association under and by virtue of the laws of the United States respecting national banks, did then and there wilfully, wrongfully, unlawfully and fraudulently make, in a certain report of the condition of the affairs of the said association at the close of business on a certain date, to wit, on the 28th day of April, A. D. 1909, which said report was then and there made to the Comptroller of the Currency in due form in accordance with the provisions of section 5211 of the Revised Statutes of the United States, a certain false entry under the head of "Re-

sources" in said report, in words and figures as follows, to wit:

"Loans and Discounts (see schedule) ....135,785.84"

[105]

the same being known and designated as Item No. 1 of Resources in said report, and which said entry so made as aforesaid then and there purported to show and did in substance and effect declare that the amount of Loans and Discounts of the said First National Bank of Juneau was in the sum of One Hundred and Thirty-five Thousand Seven Hundred and Eighty-five Dollars and Eighty-four Cents ($135,785.84), and no less;

And the Grand Jurors further say that said entry so made as aforesaid was false, in this, to wit, that the amount of Loans and Discounts of the said First National Bank of Juneau was not then and there, at the close of business on said 28th day of April, A. D. 1909, of the sum last aforesaid, but a different and much smaller sum, to wit, the sum of One Hundred and Twenty-four Thousand and Eighty-five Dollars and Eighty-four Cents ($124,085.84), and no more, he, the said C. M. Summers, President aforesaid, and he, the said Stewart G. Holt, Cashier aforesaid, then and there at the time and place of so making the said false entry in said report, as aforesaid, well knowing said entry to be then and there false, as aforesaid, and thereby intending and designing to injure and defraud the said association and certain persons to the Grand Jury unknown, and to deceive any officer of said association and the Comp-

troller of the Currency and any agent appointed by said Comptroller of the Currency to examine the affairs of said association, contrary to the form of the Statutes in such case made and provided, and against the peace and dignity of the United States. **[106]**

COUNT FORTY-ONE.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said C. M. Summers and the said Stewart G. Holt, heretofore, to wit, on the 9th day of May, A. D. 1910, at the town of Juneau, in the Division and District aforesaid, and within the jurisdiction of this court, the said C. M. Summers being then and there the President, and the said Stewart G. Holt, being then and there the Cashier, of a certain national banking association known and designated as First National Bank of Juneau, and which said First National Bank of Juneau was theretofore established and then and there existing and doing business as a national banking association under and by virtue of the laws of the United States respecting national banks, did then and there wilfully, wrongfully, unlawfully and fraudulently make, in a certain report of the condition of the affairs of the said association at the close of business on a certain date, to wit, on the 29th day of March, A. D. 1910, which said report was then and there made to the Comptroller of the Currency in due form in accordance with the provisions of section 5211 of the Revised Statutes of the United States, a certain false entry under the head of "Resources"

in said report, in words and figures as follows, to wit:

"Loans and Discounts (see schedule) ....145,743.88"

[107]

the same being known and designated as Item No. 1 of Resources in said report, and which said entry so made as aforesaid then and there purported to show and did in substance and effect declare that the amount of Loans and Discounts of the said First National Bank of Juneau was in the sum of One Hundred and Forty-five Thousand Seven Hundred and Forty-three Dollars and Eighty-eight Cents ($145,743.88), and no less;

And the Grand Jurors further say that said entry so made as aforesaid was false, in this, to wit, that the amount of Loans and Discounts of the said First National Bank of Juneau was not then and there, at the close of business on said 29th day of March, A. D. 1910, of the sum last aforesaid, but a different and much smaller sum, to wit, the sum of One Hundred and Thirty-four Thousand Forty-three Dollars and Eighty-eight Cents ($134,043.88), and no more, he the said C. M. Summers, President aforesaid, and he, the said Stewart G. Holt, Cashier aforesaid, then and there at the time and place of so making the said false entry in said report, as aforesaid, well knowing said entry to be then and there false, as aforesaid, and thereby intending and designing to injure and defraud the said association and certain persons to the Grand Jury unknown, and to deceive any officer of said association and the Comptroller of the Currency and any agent appointed by

said Comptroller of the Currency to examine the affairs of said association, contrary to the form of the statutes in such case made and provided, and against the peace and dignity of the United States. [108]

COUNT FORTY-TWO.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said C. M. Summers and the said Stewart G. Holt, heretofore, to wit, on the 15th day of July, A. D. 1910, at the town of Juneau, in the Division and District aforesaid, and within the jurisdiction of this court, the said C. M. Summers being then and there the President, and the said Stewart G. Holt being then and there the Cashier, of a certain national banking association known and designated as First National Bank of Juneau, and which said First National Bank of Juneau was theretofore established and then and there existing and doing business as a national banking association under and by virtue of the laws of the United States respecting national banks, did then and there wilfully, wrongfully, unlawfully and fraudulently make, in a certain report of the condition of the affairs of the said association at the close of business on a certain date, to wit, on the 30th day of June, A. D. 1910, which said report was then and there made to the Comptroller of the Currency in due form in accordance with the provisions of section 5211 of the Revised Statutes of the United States, a certain false entry under the head of "Resources" in said report, in words and figures as follows, to wit:

"Loans and Discounts (see
schedule)..... ....148,760.87"

[109]

the same being known and designated as Item No. 1 of Resources in said report, and which said entry so made as aforesaid then and there purported to show and did in substance and effect declare that the amount of Loans and Discounts of the said First National Bank of Juneau was in the sum of One Hundred and Forty-eight Thousand Seven Hundred and Sixty Dollars and Eighty-seven Cents ($148,760.87), and no more;

And the Grand Jurors further say that said entry so made as aforesaid was false, in this, to wit, that the amount of Loans and Discounts of the said First National Bank of Juneau was not then and there, at the close of business on said 30th day of June, A. D. 1910, of the sum last aforesaid, but a different and much smaller sum, to wit, the sum of One Hundred and Thirty-seven Thousand and Sixty Dollars and Eighty-seven Cents ($137,060.87), and no more, he, the said C. M. Summers, President as aforesaid, and he, the said Stewart G. Holt, Cashier as aforesaid, then and there at the time and place of so making the said false entry in said report, as aforesaid, well knowing said entry to be then and there false, as aforesaid, and thereby intending and designing to injure and defraud the said association and certain persons to the Grand Jury unknown, and to deceive any officer of said association and the Comptroller of the Currency and any agent appointed by said Comptroller of the Currency to ex-

amine the affairs of said association, contrary to the form of the statutes in such case made and provided, and against the peace and dignity of the United States. [110]

COUNT FORTY-THREE.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said C. M. Summers and the said Stewart G. Holt heretofore, to wit, on the 19th day of November, A. D. 1910, at the town of Juneau, in the Division and District aforesaid, and within the jurisdiction of this court, the said C. M. Summers being then and there the President, and the said Stewart G. Holt being then and there the Cashier, of a certain national banking association known and designated as First National Bank of Juneau, and which said First National Bank of Juneau was theretofore established and then and there existing and doing business as a national banking association under and by virtue of the laws of the United States respecting national banks, did then and there wilfully, wrongfully, unlawfully and fraudulently make, in a certain report of the condition of the affairs of the said association at the close of business on a certain date, to wit, on the 10th day of November, A. D. 1910, which said report was then and there made to the Comptroller of the Currency in due form in accordance with the provisions of section 5211 of the Revised Statutes of the United States, a certain false entry under the head of "Re-

sources" in said report, in words and figures as follows, to wit:

"Loans and Discounts (see
schedule).... ....149,412.18"

[111]

the same being known and designated as Item No. 1 of Resources in said report, and which said entry so made as aforesaid then and there purported to show and did in substance and effect declare that the amount of Loans and Discounts of the said First National Bank of Juneau was in the sum of One Hundred and Forty-nine Thousand Four Hundred and Twelve Dollars and Eighteen Cents ($149,412.18), and no less;

And the Grand Jurors further say that said entry so made as aforesaid was false, in this, to wit, that the amount of Loans and Discounts of the said First National Bank of Juneau was not then and there, at the close of business on said 10th day of November, A. D. 1910, of the sum last aforesaid, but a different and much smaller sum, to wit, the sum of One Hundred and Thirty-seven Thousand Seven Hundred and Twelve Dollars and Eighteen Cents ($137,712.18), and no more, he the said C. M. Summers, President aforesaid, and he, the said Stewart G. Holt, Cashier aforesaid, then and there at the time and place of so making the said false entry in said report, as aforesaid, well knowing said entry to be then and there false, as aforesaid, and thereby intending and designing to injure and defraud the said association and certain persons to the Grand Jury unknown, and to deceive any officer of said associa-

tion and the Comptroller of the Currency and any agent appointed by said Comptroller of the Currency to examine the affairs of said association, contrary to the form of the statutes in such case made and provided, and against the peace and dignity of the United States. [112]

COUNT FORTY-FOUR.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said C. M. Summers and the said Stewart G. Holt heretofore, to wit, on the 8th day of April, A. D. 1911, at the town of Juneau, in the Division and District aforesaid, and within the jurisdiction of this court, the said C. M. Summers being then and there the President, and the said Stewart G. Holt being then and there the Cashier, of a certain national banking association known and designated as First National Bank of Juneau, and which said First National Bank of Juneau was theretofore established and then and there existing and doing business as a national banking association under and by virtue of the laws of the United States respecting national banks, did then and there wilfully, wrongfully, unlawfully and fraudulently make, in a certain report of the condition of the affairs of the said association at the close of business on a certain date, to wit, on the 7th day of March, A. D. 1911, which said report was then and there made to the Comptroller of the Currency in due form in accordance with the provisions of section 5211 of the Revised Statutes of the United States, a certain false entry under the head of "Re-

sources" in said report, in words and figures as follows, to wit:

"Loans and Discounts (see schedule)...... ....159,340.88"

[113]

the same being known and designated as Item No. 1 of Resources in said report, and which said entry so made as aforesaid then and there purported to show and did in substance and effect declare that the amount of Loans and Discounts of the said First National Bank of Juneau was in the sum of One Hundred and Fifty-nine Thousand Three Hundred and Forty Dollars and Eighty-eight Cents ($159,-340.88), and no less;

And the Grand Jurors further say that said entry so made as aforesaid was false, in this to wit, that the amount of Loans and Discounts of the said First National Bank of Juneau was not then and there, at the close of business on said 7th day of March, A. D. 1911, of the sum last aforesaid, but a different and much smaller sum, to wit, the sum of One Hundred and Forty-seven Thousand Six Hundred and Forty Dollars and Eighty-eight Cents ($147,640.88), and no more, he, the said C. M. Summers, President aforesaid, and he, the said Stewart G. Holt, Cashier aforesaid, then and there at the time and place of so making the said false entry in said report, as aforesaid, well knowing said entry to be then and there false, as aforesaid, and thereby intending and designing to injure and defraud the said association and certain persons to the Grand Jury unknown, and to deceive any officer of said association and the Comp-

troller of the Currency and any agent appointed by said Comptroller of the Currency to examine the affairs of said association, contrary to the form of the statutes in such case made and provided, and against the peace and dignity of the United States. [114]

COUNT FORTY-FIVE.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said C. M. Summers and the said Stewart G. Holt, heretofore, to wit, on the 19th day of May, A. D. 1909, at the town of Juneau, in the Division and District aforesaid, and within the jurisdiction of this court, the said C. M. Summers being then and there the President, and the said Stewart G. Holt being then and there the Cashier, of a certain national banking association known and designated as First National Bank of Juneau, and which said First National Bank of Juneau was theretofore established and then and there existing and doing business as a national banking association under and by virtue of the laws of the United States respecting national banks, then and there wilfully, wrongfully, unlawfully and fraudulently did make, in a certain report of the condition of the affairs of said association at the close of business on a certain date, to wit, on the 28th day of April, A. D. 1909, which said report was then and there made to the Comptroller of the Currency in due form in accordance with the provisions of section 5211 of the Revised Statutes of the United States, a certain false entry under the head of "Liabilities of Officers and Directors," in said report, in words and figures following, to wit: [115]

Name of Officers and Directors.	Official Title.	Liability (Individual or Firm) as Payers.	Liability (Individual or Firm) as Indorser or Guarantors.	Checks and Cash Items.	Over-drafts.	No. of Shares Stock Owned.
C. M. Summers,	President.	7,185.	250.		2,723.89	33

and which said entry so made as aforesaid then and there purported to show and did in substance and effect declare that the individual liability and indebtedness of the said C. M. Summers to the said association was then and there the sum of Nine Thousand Nine Hundred and Eight Dollars and Eighty-nine Cents ($9,908.89), and no more, exclusive of his liability as indorser or guarantor;

And the Grand Jurors aforesaid further say that said entry so made, as aforesaid, was false, in this, to wit, that the amount then, at the close of business on the said 28th day of April, A. D. 1909, owing from the said C. M. Summers personally, and his indebtedness then and there, to said association, was not in the sum last aforesaid, but a different and much larger sum, to wit, the sum of Thirty-one Thousand Four Hundred and Eight Dollars and Eighty-nine Cents ($31,408.89), and not less, exclusive of his liability as indorser and guarantor, he, the said C. M. Summers, President as aforesaid, and he, the said Stewart G. Holt, Cashier as aforesaid, then and there at the time and place of so making the said false entry in said report, as aforesaid, well knowing the said entry to be false, as aforesaid, and thereby intending and designing to injure and defraud the said association and certain persons to the Grand Jury unknown, and to deceive any officer of said association and the Comptroller of the Currency and

any agent appointed by said Comptroller of the Currency to examine the affairs of the said association, contrary to the form of the statutes in such case made and approved, and against the peace and dignity of the United States. [116]

COUNT FORTY-SIX.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said C. M. Summers and the said Stewart G. Holt heretofore, to wit, on the 9th day of May, A. D. 1910, at the town of Juneau, in the Division and District aforesaid, and within the jurisdiction of this court, the said C. M. Summers being then and there the President, and the said Stewart G. Holt being then and there the Cashier, of a certain national banking association known and designated as First National Bank of Juneau, and which said First National Bank of Juneau was theretofore established and then and there existing and doing business as a national banking association under and by virtue of the laws of the United States respecting national banks, then and there wilfully, wrongfully, unlawfully and fraudulently did make, in a certain report of the condition of the affairs of said association at the close of business on a certain date, to wit, on the 29th day of March, A. D. 1910, which said report was then and there made to the Comptroller of the Currency in due form in accordance with the provisions of section 5211 of the Revised Statutes of the United States, a certain false entry under the head of "Liabilities of Officers and Directors," in said report, in words and figures following, to wit: [117]

Name of Officers and Directors.	Official Title.	Liability (Individual or Firm) as Payers.	Liability (Individual or Firm) as Indorser or Guarantors.	Checks and Cash Items.	Overdrafts.	No. of Shares Stock Owned.
C. M. Summers,	President.	7,185.	1,450.		3,731.20	33

and which said entry so made as aforesaid then and there purported to show and did in substance and effect declare that the individual liability and indebtedness of the said C. M. Summers to the said association was then and there the sum of Ten Thousand Nine Hundred and Sixteen Dollars and Twenty Cents ($10,916.20), and no more, exclusive of his liability as indorser or guarantor;

And the Grand Jurors aforesaid further say that said entry so made, as aforesaid, was false, in this, to wit, that the amount then, at the close of business on the said 29th day of March, A. D. 1910, owing from the said C. M. Summers personally, and his indebtedness then and there, to said association, was not in the sum last aforesaid, but a different and much larger sum, to wit, the sum of Forty-two Thousand Seven Hundred and Forty-six Dollars and Forty Cents ($42,746.40), and not less, exclusive of his liability as indorser and guarantor, he, the said C. M. Summers, President as aforesaid, and he, the said Stewart G. Holt, Cashier as aforesaid, then and there at the time and place of so making the said false entry in said report, as aforesaid, well knowing the said entry to be false, as aforesaid, and thereby intending and designing to injure and defraud the said association and certain persons to the Grand Jury unknown, and to deceive any officer of said association and the Comptroller of the Currency

and any agent appointed by said Comptroller of the Currency to examine the affairs of the said association, contrary to the form of the statutes in such case made and provided, and against the peace and dignity of the United States. [118]

COUNT FORTY-SEVEN.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said C. M. Summers, and the said Stewart G. Holt, heretofore, to wit, on the 15th day of July, A. D. 1910, at the town of Juneau, in the Division and District aforesaid, and within the jurisdiction of this court, the said C. M. Summers being then and there the President, and the said Stewart G. Holt being then and there the Cashier of a certain national banking association known and designated as First National Bank of Juneau, and which said First National Bank of Juneau was theretofore established and then and there existing and doing business as a national banking association under and by virtue of the laws of the United States respecting national banks, then and there wilfully, wrongfully, unlawfully and fraudulently did make in a certain report of the condition of the affairs of said association at the close of business on a certain date, to wit, on the 30th day of June, A. D. 1910, which said report was then and there made to the Comptroller of the Currency in due form in accordance with the provisions of section 5211 of the Revised Statutes of the United States, a certain false entry under the head of "Liabilities of Officers and Directors," in said report, in words and figures following, to wit: [119]

Name of Officers and Directors.	Official Title.	Liability (Individual or Firm) as Payers.	Liability (Individual or Firm) as Indorser or Guarantors.	Checks and Cash Items.	Overdrafts.	No. of Shares Stock Owned.
C. M. Summers,	President.	7,185.	1,450.		4,546.73	33

and which said entry so made as aforesaid then and there purported to show and did in substance and effect declare that the individual liability and indebtedness of the said C. M. Summers to the said association was then and there the sum of Eleven Thousand Seven Hundred and Thirty-one Dollars and Seventy-three Cents ($11,731.73), and no more, exclusive of his liability as indorser or guarantor;

And the Grand Jurors aforesaid further say that said entry so made, as aforesaid, was false, in this, to wit, that the amount then, at the close of business on the said 30th day of June, A. D. 1910, owing from the said C. M. Summers personally, and his indebtedness then and there, to said association, was not in the sum last aforesaid, but a different and much larger sum, to wit, the sum of Forty-five Thousand One Hundred and Eighty-nine Dollars and Twenty-eight Cents ($45,189.28), and not less, exclusive of his liability as indorser and guarantor, he, the said C. M. Summers, President as aforesaid, and he, the said Stewart G. Holt, Cashier as aforesaid, then and there at the time and place of so making the said false entry in said report, as aforesaid, well knowing the said entry to be false, as aforesaid, and thereby intending and designing to injure and defraud the said association and certain persons to the Grand Jury unknown, and to deceive any officer of said association and the Comptroller of the Currency and any agent appointed by said Comptroller of the Currency to ex-

amine the affairs of the said association, contrary to the form of the statutes in such case made and provided, and against the peace and dignity of the United States. [120]

COUNT FORTY-EIGHT.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said C. M. Summers and the said Stewart G. Holt heretofore, to wit, on the 19th day of November, A. D. 1910, at the town of Juneau, in the Division and District aforesaid, and within the jurisdiction of this court, the said C. M. Summers being then and there the President, and the said Stewart G. Holt being then and there the Cashier, of a certain national banking association known and designated as First National Bank of Juneau, and which said First National Bank of Juneau was theretofore established and then and there existing and doing business as a national banking association under and by virtue of the laws of the United States respecting national banks, then and there wilfully, wrongfully, unlawfully and fraudulently did make, in a certain report of the condition of the affairs of said association at the close of business on a certain date, to wit, on the 10th day of November, A. D. 1910, which said report was then and there made to the Comptroller of the Currency in due form in accordance with the provisions of Section 5211 of the Revised Statutes of the United States, a certain false entry under the head of "Liabilities of Officers and Directors," in said report, in words and figures following, to wit:

Name of Officers and Directors.	Official Title.	Liability (Individual or Firm) as Payers.	Liability (Individual or Firm) as Indorser or Guarantors.	Checks and Cash Items.	Over-drafts.	No. of Shares Stock Owned.
C. M. Summers,	President.	8,935.	250.		6,133.09	33

[121]

and which said entry so made as aforesaid then and there purported to show and did in substance and effect declare that the individual liability and indebtedness of the said C. M. Summers to the said association was then and there the sum of Fifteen Thousand and Sixty-eight Dollars and Nine Cents ($15,068.09), and no more, exclusive of his liability as indorser or guarantor;

And the Grand Jurors aforesaid further say that said entry so made, as aforesaid, was false, in this, to wit, that the amount then, at the close of business on the said 10th day of November, A. D. 1910, owing from the said C. M. Summers personally, and his indebtedness then and there, to said association, was not in the sum last aforesaid, but a different and much larger sum, to wit, the sum of Fifty-two Thousand and Twenty-five Dollars and Sixty-four Cents ($52,025.64), and not less, exclusive of his liability as indorser and guarantor, he, the said C. M. Summers, President, as aforesaid, and he, the said Stewart G. Holt, Cashier as aforesaid, then and there at the time and place of so making the said false entry in said report as aforesaid, well knowing the said entry to be false, as aforesaid, and thereby intending and designing to injure and defraud the said association and certain persons to the Grand Jury unknown, and to deceive any officer of said association and the Comptroller of the Currency and any agent ap-

pointed by said Comptroller of the Currency to examine the affairs of the said association; contrary to the form of the statutes in such case made and provided, and against the peace and dignity of the United States. [122]

COUNT FORTY–NINE.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said C. M. Summers and the said Stewart G. Holt, heretofore, to wit, on the 8th day of April, A. D. 1911, at the town of Juneau, in the Division and District aforesaid, and within the jurisdiction of this court, the said C. M. Summers being then and there the President, and the said Stewart G. Holt being then and there the Cashier, of a certain national banking association known and designated as First National Bank of Juneau, and which said First National Bank of Juneau was theretofore established and then and there existing and doing business as a national banking association under and by virtue of the laws of the United States respecting national banks, then and there wilfully, wrongfully, unlawfully and fraudulently did make, in a certain report of the condition of the affairs of said association at the close of business on a certain date, to wit, on the 7th day of March, A. D. 1911, which said report was then and there made to the Comptroller of the Currency in due form in accordance with the provisions of section 5211 of the Revised Statutes of the United States, a certain false entry under the head of "Liabilities of Officers and Directors," in said report, in words and figures following, to wit:

Name of Officers and Directors.	Official Title.	Liability (Individual or Firm) as Payers.	Liability (Individual or Firm) as Indorser or Guarantors.	Checks and Cash Items.	Overdrafts.	No. of Shares Stock Owned.
C. M. Summers.	President	7,185.			2,485.37	23

[123]

and which said entry so made as aforesaid then and there purported to show and did in substance and effect declare that the individual liability and indebtedness of the said C. M. Summers to the said association was then and there the sum of Nine Thousand Six Hundred and Seventy Dollars and Thirty-seven Cents ($9,670.37), and no more;

And the Grand Jurors aforesaid further say that said entry so made, as aforesaid, was false, in this, to wit, that the amount then, at the close of business on the said 7th day of March, A. D. 1911, owing from the said C. M. Summers personally, and his indebtedness then and there, to said association, was not in the sum last aforesaid, but a different and much larger sum, to wit, the sum of Fifty-two Thousand Four Hundred and Seventy-seven Dollars and Ninety-two Cents ($52,477.92), and not less, he, the said C. M. Summers, President as aforesaid, and he, the said Stewart G. Holt, Cashier as aforesaid, then and there at the time and place of so making the said false entry in said report, as aforesaid, well knowing the said entry to be false, as aforesaid, and thereby intending and designing to injure and defraud the said association and certain persons to the Grand Jury unknown, and to deceive any officer of said association and the Comptroller of the Currency and any agent appointed by said Comptroller of the Currency to examine the affairs of the said associa-

tion, contrary to the form of the Statutes in such case made and provided, and against the peace and dignity of the United States. [124]

COUNT FIFTY.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said C. M. Summers and the said Stewart G. Holt heretofore, to wit, on the 19th day of November, A. D. 1910, at the town of Juneau, in the Division and District aforesaid, and within the jurisdiction of this court, the said C. M. Summers being then and there the President, and the said Stewart G. Holt being then and there the Cashier, of a certain national banking association known and designated as First National Bank of Juneau, and which said First National Bank of Juneau was theretofore established and then and there existing and doing business as a national banking association under and by virtue of the laws of the United States respecting national banks, then and there wilfully, wrongfully, unlawfully and fraudulently did make, in a certain report of the condition of the affairs of the said association at the close of business on a certain date, to wit, on the 10th day of November, A. D. 1910, which said report was then and there made to the Comptroller of the Currency in due form in accordance with the provisions of Section 5211 of the Revised Statutes of the United States, a certain false entry in said report, known and designated as Item G, in words and figures as follows, to wit:

"G. Bad debts, as defined in Section
5204, Revised Statutes........$7,447."

[125]

and which said entry so made as aforesaid then and there purported to show and did in substance and effect declare that of the Debts due to said association in the form of Loans and Discounts and included in Item No. 1 of Resources in said report, on which interest was at that time past due and unpaid for the period of six months and which were not well secured and then in the process of collection, amounted to Seven Thousand Four Hundred and Forty-seven Dollars ($7,447), and no more;

And the Grand Jurors further say that said entry so made as aforesaid was false, in this, to wit, that the said amount of Bad Debts as defined in section 5204 of the said Revised Statutes, then and there, at the close of business on the said 10th day of November, A. D. 1910, owing to said association in the form of Loans and Discounts and included in the Item No. 1 of Resources in said report, was not in the sum last aforesaid, but in a different and much greater sum, to wit, in the sum of Thirty-four Thousand Seven Hundred and Eighty-eight Dollars and Fifty Cents ($34,788.50), and no less, he, the said C. M. Summers, President aforesaid, and he, the said Stewart G. Holt, Cashier aforesaid, then and there at the time and place of so making the said false entry in said report, as aforesaid, well knowing the said entry to be then and there false, as aforesaid, and thereby intending and designing to injure and defraud the said association and certain persons to the Grand Jury unknown, and to deceive any officer of said association and the Comptroller of the Currency and any agent appointed by said Comptroller

of the Currency to examine the affairs of said association, contrary to the form of the Statutes in such case made and provided, and against the peace and dignity of the United States. [126]

COUNT FIFTY-ONE.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said C. M. Summers and the said Stewart G. Holt heretofore, to wit, on the 8th day of April, A. D. 1911, at the town of Juneau, in the Division and District aforesaid, and within the jurisdiction of this court, the said C. M. Summers being then and there the President, and the said Stewart G. Holt being then and there the Cashier, of a certain national banking association known and designated as First National Bank of Juneau, and which said First National Bank of Juneau was theretofore established and then and there existing and doing business as a national banking association under and by virtue of the laws of the United States respecting national banks, then and there wilfully, wrongfully, unlawfully and fraudulently did make, in a certain report of the condition of the affairs of the said association at the close of business on a certain date, to wit, on the 7th day of March, A. D. 1911, which said report was then and there made to the Comptroller of the Currency in due form in accordance with the provisions of section 5211 of the Revised Statutes of the United States, a certain false entry in said report, known

and designated as Item G, in words and figures as follows, to wit:

"G. Bad debts, as defined in Section 5204, Revised Statutes..$7,317.50"

[127]

and which said entry so made as aforesaid then and there purported to show and did in substance and effect declare that of the Debts due to said association in the form of Loans and Discounts and included in Item No. 1 of Resources in said report on which interest was at that time past due and unpaid for the period of six months and which were not well secured and then in the process of collection, amounted to Seven Thousand Three Hundred and Seventeen Dollars and Fifty Cents ($7,317.50), and no more;

And the Grand Jurors further say that said entry so made as aforesaid was false, in this, to wit, that the said amount of Bad Debts as defined in section 5204 of the said Revised Statutes, then and there, at the close of business on the said 7th day of March, A. D. 1911, owing to said association in the form of Loans and Discounts and included in the Item No. 1 of Resources in said report, was not in the sum last aforesaid, but in a different and much greater sum, to wit, in the sum of Thirty-four Thousaid Seven Hundred and Eighty-eight Dollars and Fifty Cents ($34,788.50), and no less, he, the said C. M. Summers, President aforesaid, and he, the said Stewart G. Holt, Cashier aforesaid, then and there at the time and place of so making the said false entry in said report, as aforesaid, well knowing the

said entry to be then and there false, as aforesaid, and thereby intending and designing to injure and defraud the said association and certain persons to the Grand Jury unknown, and to deceive any officer of said association and the Comptroller of the Currency and any agent appointed by said Comptroller of the Currency to examine the affairs of said association, contrary to the form of the Statutes in such case made and provided, and against the peace and dignity of the United States. **[128]**

COUNT FIFTY-TWO.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said C. M. Summers and the said Stewart G. Holt heretofore, to wit, on the 1st day of December, A. D. 1909, at the town of Juneau, in the Division and District aforesaid, and within the jurisdiction of this court, the said C. M. Summers being then and there the President, and the said Stewart G. Holt being then and there the Cashier, of a certain national banking association known and designated as First National Bank of Juneau, and which said First National Bank of Juneau was theretofore established and then existing and doing business as a national banking association under and by virtue of the laws of the United States respecting national banks, wilfully, wrongfully, unlawfully and fraudulently then and there did make, in a certain report of the condition of the affairs of the said association at the close of business on a certain date, to wit, on the 16th day of November, A. D. 1909, which said report was then and there made to the Comptroller of the Currency

in due form in accordance with the provisions of section 5211 of the Revised Statutes of the United States, a certain false entry under the head of "Loans exceeding the limit prescribed by Section 5200 of the Revised Statutes, including Loans which exceed this limit due from State and Private Banks and Bankers, Trust Companies and Savings Banks, Overdraft, if any, to be classed with Loans," in said report, in words and figures as follows, to wit:

Name of Borrower.	Enter Full Amount of Loan.
Eagle River Mining Co.	7,449.39
Temporary Overdraft Acc't.	
Since reduced under limit.	

[129]

and which said entry so made as aforesaid then and there purported to show and did in substance and effect declare that the only loan of said association exceeding the limit prescribed by Section 5200 of the Revised Statutes of the United States, was a loan by way of overdraft to Eagle River Mining Company of the sum of Seven Thousand Four Hundred and Forty-nine Dollars and Thirty-nine Cents ($7,-449.39), and no more;

And the Grand Jurors further say that said entry so made as aforesaid was false, in this, to wit, that at the close of business on the said 16th day of November, A. D. 1909, there was owing to the said association, in the form of loans, from the Ketchikan Power Company, a corporation, the sum of Twenty-eight Thousand Dollars ($28,000), and no less, in addition to the amount set out in the said false item as owing said association from the said Eagle River

Mining Company, the amount of the capital stock of the said First National Bank of Juneau actually paid in at the various times above mentioned not being in excess of the sum of Fifty Thousand Dollars ($50,000), he, the said C. M. Summers, President as aforesaid, and he, the said Stewart G. Holt, Cashier as aforesaid, then and there at the time and place of so making said false entry in said report, as aforesaid, well knowing said entry to be then and there false, as aforesaid, and thereby intending and designing to injure and defraud the said association and certain persons to the Grand Jury unknown, and to deceive any officer of said association and the Comptroller of the Currency and any agent appointed by said Comptroller of the Currency to examine the affairs of said association, contrary to the form of the Statutes in such case made and provided, and against the peace and dignity of the United States. **[130]**

COUNT FIFTY-THREE.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said C. M. Summers and the said Stewart G. Holt heretofore, to wit, on the 8th day of April, A. D. 1911, at the town of Juneau, in the Division and District aforesaid, and within the jurisdiction of this court, the said C. M. Summers being then and there the President, and the said Stewart G. Holt being then and there the Cashier, of a certain national banking association known and designated as First National Bank of Juneau, and which said First National Bank of Juneau was theretofore established and then ex-

isting and doing business as a national banking association under and by virtue of the laws of the United States respecting national banks, wilfully, wrongfully, unlawfully and fraudulently then and there did make, in a certain report of the condition of the affairs of the said association at the close of business on a certain date, to wit, on the 7th day of March, A. D. 1911, which said report was then and there made to the Comptroller of the Currency in due form in accordance with the provisions of section 5211 of the Revised Statutes of the United States, a certain false entry under the head of "Loans exceeding the limit prescribed by section 5200 of the Revised Statutes, including Loans which exceed this limit due from State and Private Banks and Bankers, Trust Companies and Savings Banks, Overdraft, if any, to be classed with Loans," in said report, in words and figures as follows, to wit:

Name of Borrower.	Enter Full Amount of Loan.
NONE.	

[131]

which said entry so made as aforesaid then and there purported to show and did in substance and effect declare that there was, at the close of business on the said 7th day of March, A. D. 1911, not owing to said association from any person, company, copartnership or corporation, by way of loans, any sum in excess of the limits prescribed by section 5200 of the Revised Statutes of the United States;

And the Grand Jurors further say that said entry so made as aforesaid was false, in this, to wit, that at the time aforementioned, to wit, at the close of

business on the said 7th day of March, A. D. 1911, there was due and owing to said association, in the form of loans, from the Ketchikan Power Company, a corporation, the sum of Twenty-seven Thousand Dollars ($27,000), and from the Cordova Power Company, a corporation, the sum of Twenty Thousand Dollars ($20,000), and no less, the amount of the capital stock of the said First National Bank of Juneau actually paid in at the various times above mentioned not being in excess of the sum of Fifty Thousand Dollars ($50,000), he the said C. M. Summers, President as aforesaid, and he the said Stewart G. Holt, Cashier as aforesaid, then and there at the time and place of so making said false entry in said report, as aforesaid, well knowing said entry to be then and there false, as aforesaid, and thereby intending and designing to injure and defraud the said association and certain persons to the Grand Jury unknown, and to deceive any officer of said association and the Comptroller of the Currency and any agent appointed by said Comptroller of the Currency to examine the affairs of said association, contrary to the form of the Statutes in such case made and provided, and against the peace and dignity of the United States. **[132]**

COUNT FIFTY-FOUR.

And the Grand Jurors aforesaid, upon their oaths aforesaid do further present that the said C. M. Summers and the said Stewart G. Holt heretofore, to wit, on the 6th day of July, A. D. 1911, at the town of Juneau, in the Division and District aforesaid, and within the jurisdiction of this court, the said C. M. Sum-

mers being then and there the President, and the said Stewart G. Holt being then and there the Cashier, of a certain national banking association known and designated as First National Bank of Juneau, and which said First National Bank of Juneau was theretofore established and then existing and doing business as a national banking association under and by virtue of the laws of the United States respecting national banks, did, then and there, wilfully, wrongfully, unlawfully and fraudulently, without the knowledge and consent of said association or its Board of Directors, and with the intent then and there on the part of him, the said C. M. Summers, and him, the said Stewart G. Holt, to injure and defraud the said association, abstract from said association and convert to their own use, and to the use of each of them, moneys, funds and credits of the property of said association, of the aggregate amount and actual value of Thirty-three Thousand One Hundred and Twenty-one Dollars and Eleven Cents ($33,121.11), to the damage and injury of said association in the sum of Thirty-three Thousand One Hundred and Twenty-one Dollars and Eleven Cents ($33,121.11), a further description of which moneys, funds and credits so abstracted being to this Grand Jury unknown, contrary to the form of the Statutes in such case made and provided, and against the peace and dignity of the United States. [133]

COUNT FIFTY-FIVE.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said C. M. Summers and the said Stewart G. Holt heretofore, to wit,

on the 15th day of March, A. D. 1910, in said District and Division, and within the jurisdiction of this court, the said C. M. Summers being then and there the President, and the said Stewart G. Holt being then and there the Cashier, of a certain national banking association known and designated as First National Bank of Juneau, and which said First National Bank of Juneau was theretofore duly established and then existing and doing business as a national banking association under and by virtue of the laws of the United States respecting national banks, and the said C. M. Summers, President aforesaid, and the said Stewart G. Holt, Cashier aforesaid, so being such President and Cashier respectively, and as such in possession, charge and control of the moneys, funds and credits and properties of said association, then and there, with the intent to injure and defraud the said banking association of the sum of Six Thousand Dollars ($6,000) lawful money of the United States, did wilfully, wrongfully, unlawfully and fraudulently misapply moneys, funds and credits of said association in the sum and to the amount and value of Six Thousand Dollars ($6,000), in manner and form as follows, to wit:

That theretofore, to wit, on the 5th day of March, A. D. 1910, the Farmers' and Merchants' Bank of Wenatchee, the same being a banking institution then doing business as [134] such at Wenatchee, in the State of Washington, at the instance and request of said C. M. Summers and by his procurement, made and drew its draft on the said First National Bank of Juneau in the sum of Six Thousand Dollars ($6,000),

for the payment of an indebtedness then owing by said C. M. Summers, personally, to said Farmers and Merchants' Bank of Wenatchee, which draft was thereafter and on or about the 15th day of March, A. D. 1910, by the said C. M. Summers and the said Stewart G. Holt, acting as President and Cashier aforesaid, respectively, wilfully, wrongfully, unlawfully and fraudulently, and without the authority from or the consent of the said association or its Board of Directors, and, with the intent aforesaid, paid and caused to be paid out of the funds and credits of the said First National Bank of Juneau then in the Bank of California National Association of Seattle, a corporation then existing and doing business as a banking association in the City of Seattle, Washington, a further description of which moneys, funds and credits so wrongfully paid, as aforesaid, being to the Grand Jury unknown, the said sum so paid and caused to be paid out of the said funds and credits of the said First National Bank of Juneau being then and there the personal obligation of him, the said C. M. Summers as aforesaid, and in no wise **[135]** an obligation or indebtedness of the said First National Bank of Juneau, as he, the said C. M. Summers and he, the said Stewart G. Holt then and there well knew, and was so paid and caused to be paid for the personal benefit and advantage and in discharge of the personal obligation of him, the said C. M. Summers, and not for the benefit or to the credit or advantage of said First National Bank of Juneau, but to the injury of said First National Bank of Juneau and to its loss in the sum of Six Thousand

Dollars ($6,000) lawful money of the United States, said payment being so made and caused to be made with the intent aforesaid on the part of him, the said C. M. Summers, and him, the said Stewart G. Holt, he, the said C. M. Summers being then and there, prior to and at the time of the said payment of said sum of Six Thousand Dollars ($6,000) of the funds and credits of said association, insolvent and indebted to the said association in the sum of more than Thirty Thousand Dollars ($30,000), and the capital stock of said association being then and there not more than Fifty Thousand Dollars ($50,000), all of which the said C. M. Summers and the said Stewart G. Holt then and there well knew, contrary to the form of the Statutes in such case made and provided, and against the peace and dignity of the United States. **[136]**

COUNT FIFTY-SIX.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said C. M. Summers, and the said Stewart G. Holt heretofore, to wit, on the 13th day of May, A. D. 1910, in said District and Division, and within the jurisdiction of this court, the said C. M. Summers being then and there the President, and the said Stewart G. Holt being then and there the Cashier, of a certain national banking association known and designated as First National Bank of Juneau, and which said First National Bank of Juneau, was theretofore duly established and then existing and doing business as a national banking association under and by virtue of the laws of the United States respecting national banks, and the said C. M. Summers, President aforesaid,

and the said Stewart G. Holt, Cashier aforesaid, so being such President and Cashier respectively, and as such in possession, charge and control of the moneys, funds, credits and properties of said association, then and there, with the intent to injure and defraud said banking association of the sum of Twelve Hundred Dollars ($1,200), lawful money of the United States, did wilfully, wrongfully, unlawfully and fraudulently misapply funds and credits of said association in the sum of and to the amount and value of Twelve Hundred Dollars ($1,200) in manner and form as follows, to wit: [137]

That theretofore, on the 5th day of May, A. D. 1910, the said C. M. Summers was personally indebted to the Canadian Lang Stove Company, a corporation, in the sum of Twelve Hundred Dollars ($1,200), and that on said date the said Canadian Lang Stove Company, through Wythe Denby, its agent, made its draft upon the said C. M. Summers, in words and figures as follows, to wit:

$1200.00 Seattle, May 5, 1910.

At sight pay to the order of

THE CANADIAN BANK OF COMMERCE

Twelve Hundred and no/100..............Dollars.

Value received and charge to the acct. of 40% coll. on

CANADIAN LANG STOVE CO. STOCK.

WYTHE DENBY.

To C. M. Summers,

1st National Bank,

Juneau.

which said draft being then and there for the personal

indebtedness and obligation of said C. M. Summers, as aforesaid, as the said C. M. Summers and the said Stewart G. Holt, then and there well knew, was subsequently, to wit, on the 13th day of May, A. D. 1910, by the said C. M. Summers and the said Stewart G. Holt, acting as said President and Cashier aforesaid respectively, caused to be paid out of the funds and credits of the said First National Bank of Juneau, by then and there as such President and Cashier as aforesaid causing the said First National Bank of Juneau to issue its draft, known and designated as No. 9846, on the National Bank of Commerce at Seattle, in the State of Washington, for the sum of Twelve Hundred Dollars ($1,200) in favor of the said Canadian Bank of Commerce in payment of said draft of the said Canadian Lang Stove Company above set out which draft [138] of the said First National Bank of Juneau upon the National Bank of Commerce at Seattle was subsequently and on or about the 18th day of May, A. D. 1910, honored and fully paid by the said National Bank of Commerce at Seattle, Washington, and charged to the said First National Bank of Juneau, said payment of Twelve Hundred Dollars ($1,200) being so made as aforesaid solely for the benefit and advantage of said C. M. Summers, personally, and in no manner for the benefit or advantage of the said First National Bank of Juneau, and was so made and caused to be made by the said C. M. Summers and the said Stewart G. Holt, as such President and Cashier as aforesaid, wilfully, wrongfully, unlawfully and fraudulently, and without the authority from or consent of the said

association, or its Board of Directors, and with the intent then and there on the part of him, the said C. M. Summers, and him, the said Stewart G. Holt, to injure and defraud said association, as aforesaid, to the injury of said association and to its loss in the sum of Twelve Hundred Dollars ($1,200), lawful money of the United States, the said C. M. Summers being then and there, prior to and at the time of the said payment of said sum of Twelve Hundred Dollars ($1,200), in manner and form above set out, insolvent and indebted to the said association in the sum of more than Thirty Thousand Dollars ($30,000), and the capital stock of said association being then and there not more than Fifty Thousand Dollars ($50,-000), all of which said C. M. Summers and said Stewart G. Holt then and there well knew, contrary to the form of the Statutes in such case made and provided, and against the peace and dignity of the United States. **[139]**

And so the Grand Jurors duly selected, empaneled, sworn, and charged as aforesaid, upon their oaths do say: That C. M. Summers and Stewart G. Holt, did then and there commit the crimes of making false entries, and of misapplying funds, and of abstracting funds, in violation of the provisions of section 5209 of the Revised Statutes of the United States, in manner and form aforesaid, contrary to the form of the statutes in such cases made and provided, and against

the peace and dignity of the United States of America.

JOHN RUSTGARD,
United States Attorney. [140]

WITNESSES:
(Examined Before the Grand Jury.)
F. M. BAILEY.
JOHN KENNEDY.
GEORGE KNOX.
PAUL P. FLOYD.
W. A. THOMPSON.
L. P. SHACKLEFORD.
HENRY SHATTUCK. [141]

[142]

[Endorsed]: Form No. 195. No. 821–B. United States District Court, District of Alaska, First Division. The United States of America vs. C. M. Summers and Stewart G. Holt. Indictment. Violation of Sec. 5209, R. S., Making False Entries, Misapplying Funds, and Abstracting Funds. A True Bill. J. Latimer Gray, Foreman. Filed this 5th Day of January, A. D. 1912. E. W. Pettit, Clerk. John Rustgard, U. S. Atty. Presented by J. Latimer Gray, Foreman of the Grand Jury, in the Presence of the Grand Jury, in Open Court, and Filed in Open Court With the Clerk of the District Court, All on this 5th day of January, 1912. E. W. Pettit, Clerk. [143]

In the District Court for the District of Alaska, Division No. 1.

No. 821–B.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

C. M. SUMMERS and STEWART G. HOLT,

Defendants.

Bench Warrant.

IN THE NAME OF THE UNITED STATES OF AMERICA.

To the United States Marshal for the District of Alaska, Division No. 1, or any Deputy Thereof, Greeting:

An indictment having been found on the 5th day of January, 1912, in the District Court for the District of Alaska, Division No. 1, charging defendants with the crime of violation of Sec. 5209, R. S.:

This is to command you forthwith to arrest the defendants, C. M. Summers and Stewart G. Holt, and bring them before such Court, to answer the said indictment, or if the Court have adjourned for the term that you detain them in your custody.

By order of the Court.

WITNESS my hand and the seal of said Court, affixed at Juneau, this 5th day of January, 1912.

[Seal] E. W. PETTIT,

Clerk of the District Court for the District of Alaska, Division No. 1.

United States of America,
District of Alaska,
Division No. 1,—ss.

I hereby certify that I received the within bench warrant on the 5th day of Jan., A. D. 1912, and thereafter executed the same by arresting the within named C. M. Summers and S. G. Holt, at Juneau, in said District of Alaska, on the 5 day of Jan., A. D. 1912, and that I now hold the said C. M. Summers and S. G. Holt **[144]** in my custody by virtue of said warrant.

Dated the 5th day of Jan., A. D. 1912.

H. L. FAULKNER,
U. S. Marshal.
By ————,
Deputy.

[Endorsed]: No. 821-B. In the District Court for the District of Alaska, Division No. 1. The United States of America, Plaintiff, vs. C. M. Summers and Stewart G. Holt, Defendants. Bench Warrant. The Defendant to be Admitted to Bail in the Sum of $———. ————, Clerk. Filed Jan. 5, 1912. E. W. Pettit, Clerk. **[145]**

In the District Court for the District of Alaska, Division No. 1, at Juneau.

No. 821–B.

UNITED STATES

vs.

C. M. SUMMERS and STEWART G. HOLT.

Arraignment.

Now, on this day, came the United States Attorney, John Rustgard; came also the defendants in the custody of the United States Marshal, and being represented by their attorneys, Messrs. L. P. Shackleford and Wm. Bayless; and upon motion of L. P. Shackleford, the United States Attorney in open court, consenting thereto, the reading of the indictment herein is omitted, and defendants were each served in open court with a copy of the indictment; and defendants being each asked by the Court if they are indicted by their true names, and each answering that he is, defendants are given until 10 o'clock A. M. Monday, January 8, 1912, in which to enter their pleas herein; and bail for appearance is fixed in the amount of Five Thousand Dollars for each defendant.

Dated Friday, January 5, 1912.

THOMAS R. LYONS,
Judge.

(Criminal Journal, p. 17.) [146]

In the United States District Court for the District of Alaska, Division No. One, at Juneau.

THE UNITED STATES OF AMERICA.

vs.

C. M. SUMMERS and S. G. HOLT.

Bail Bond.

An indictment having been found on the 5th day of January, 1912, in the District Court of the United States for the District of Alaska, Division No. One, at Juneau, against C. M. Summers and S. G. Holt, charging them with the crime of violating Sec. 5209 —Revised Statutes of U. S.—and the said C. M. Summers having been duly admitted to bail in the sum of $5,000.00 (Five Thousand Dollars):

We, B. L. Thane, by occupation a mining engineer, and Henry Shattuck, by occupation a merchant, both residents of Juneau, Alaska, hereby undertake that the above-named C. M. Summers shall appear and answer the indictment above mentioned in whatever court it may be prosecuted, and shall at all times render himself amenable to the orders and process of the court; and if convicted shall appear for judgment and render himself in execution thereof; or if he fail to perform either of those conditions, that we will pay to the United States the sum of Five Thousand ($5,000) Dollars.

Dated at Juneau, Alaska, January 5th, 1912.

Taken and acknowledged before me the day and year above written.

C. M. SUMMERS. [Seal]
H. SHATTUCK. [Seal]
B. L. THANE. [Seal]

United States of America,
District of Alaska,
Town of Juneau,—ss.

B. L. Thane and Henry Shattuck, being first [147] duly sworn, each for himself and not one for the other says: I am a resident and householder within the District of Alaska, and not counsellor or attorney, nor marshal, clerk or other officer of any court. I am worth the sum of $5,000.00 (Five Thousand Dollars), exclusive of property exempt from execution, and over and above all just debts and liabilities.

H. SHATTUCK.
B. L. THANE.

Subscribed and sworn to before me this 5th day of January, A. D. 1912.

[Notarial Seal] W. S. BAYLESS,
Notary Public for Alaska.

The above undertaking is allowed this 5th day of January, A. D. 1912.

THOMAS R. LYONS,
Judge of the District Court for the District of Alaska, Division No. One, at Juneau.

[Endorsed]: Original. No. 821-B. In the District Court for the District of Alaska, Division No. 1, at Juneau. U. S. of America, Plaintiff, vs. C. M.

Summers and S. G. Holt, Defendants. Bail Bond of C. M. Summers. Shackleford & Bayless, Attorneys for Defts. Office, Juneau, Alaska. Filed Jan. 5, 1912. E. W. Pettit, Clerk. By ————, Deputy. **[148]**

District Court for the District of Alaska, Division Number One, at Juneau.

THE UNITED STATES OF AMERICA

vs.

C. M. SUMMERS and STEWART G. HOLT.

Demurrer.

Comes now one of the defendants, C. M. Summers, and demurs to the indictment on file herein upon the following grounds:

That it appear upon the face thereof

First: That the Grand Jury by which the said indictment was found had no legal authority to inquire into the crime charged because the same is not triable within the District.

Second: For the reason that it does not substantially conform to the requirements of Chapter 7, Title II, of the Act of Congress approved March 3d, 1899, providing for a Code of Criminal Procedure for the District of Alaska, and particularly to Section 43 of Title II of said Act.

Third: That more than one crime is charged in the indictment.

Fourth: That the facts stated in the said indictment does not constitute a crime.

And comes now the said defendant, C. M. Sum-

mers, and further demurs separately to each and every count in the said indictment from Count 1 to Count 56, inclusive, upon each and every one of the grounds above stated.

LEWIS P. SHACKLEFORD,
Attorney for Defendant.

Filed Jan. 8, 1912. E. W. Pettit, Clerk. By ————, Deputy. [149]

In the District Court for the District of Alaska, Division Number One, at Juneau.

No. 821–B.

UNITED STATES

vs.

C. M. SUMMERS and STEWART G. HOLT.

Order Overruling Demurrer.

Now, on this day came on regularly for hearing the demurrer of defendant C. M. Summers to the indictment herein, which demurrer was submitted without argument; and the Court being fully advised in the premises, overrules said demurrer, to which order and ruling of the Court defendant C. M. Summers, by counsel, Messrs. Shackleford & Bayless, excepts and exception is allowed.

Dated Monday, January 8, 1912.

THOMAS R. LYONS,
Judge.

(Criminal Journal, p. 24.) [150]

In the District Court for the District of Alaska, Division No. One, at Juneau.

No. 821–B.

UNITED STATES

vs.

C. M. SUMMERS and STEWART G. HOLT.

Plea of C. M. Summers.

Now, on this day, comes the United States Attorney, John Rustgard; comes also the defendant, C. M. Summers, in person and by his attorneys, Messrs. Shackleford & Bayless, and said defendant C. M. Summers having on a prior day of this term been duly arraigned, is now asked by the Court if he, said C. M. Summers, is guilty or not guilty of the crime charged against him in the indictment herein, namely, that of violation of section 5209, Revised Statutes of the United States; to which defendant C. M. Summers says that he is not guilty, and therefore puts himself upon the country, and the United States Attorney, for and on behalf of the Government, doth the same, and this cause is continued awaiting trial.

Dated Monday, January 8, 1912.

THOMAS R. LYONS,
Judge.

(Criminal Journal, p. 24.) **[151]**

District Court for the District of Alaska, Division Number One, at Juneau.

THE UNITED STATES OF AMERICA.

vs.

C. M. SUMMERS and STEWART G. HOLT.

Motion to Change Place of Trial.

Comes now C. M. Summers, one of the defendants in the above-entitled cause, and moves that the place of trial of this defendant be changed, and that the defendant be tried at the contemplated May term of this court at Ketchikan, Alaska. This motion is based upon the records and files herein and upon the accompanying affidavits.

LEWIS P. SHACKLEFORD,
Attorney for Defendant. **[152]**

[Affidavit of C. M. Summers in Support of Motion to Change Place of Trial.]

District Court for the District of Alaska, Division Number One, at Juneau.

THE UNITED STATES OF AMERICA

vs.

C. M. SUMMERS and STEWART G. HOLT.

C. M. Summers, being first duly sworn, on oath deposes and says: I am one of the defendants in the above-entitled action; that I cannot safely proceed to the trial of this action until after the investigation of the books of a number of banks corresponding with the

First National Bank, and until full and complete advice and information is received on all of the matters charged in the indictment herein; that I was present in Juneau for a number of weeks before and after my retirement from the First National Bank on or about the fifth day of July, 1911; that I am fully advised as to the state of feeling and opinion in this community, and that from such advice I am satisfied that the merits or alleged merits of this cause have been fully discussed by nearly all persons eligible to jury service north of Wrangell Narrows, and that a fair, impartial and unbiased jury cannot be obtained in the first Division of Alaska, north of Wrangell Narrows.

C. M. SUMMERS.

Subscribed and sworn to before me this 8th day of January, A. D. 1912.

[Notarial Seal] W. S. BAYLESS,
Notary Public for Alaska. [153]

[Affidavit of L. P. Shackleford in Support of Motion to Change Place of Trial.]

District Court for the District of Alaska, Division Number One, at Juneau.

THE UNITED STATES OF AMERICA

vs.

C. M. SUMMERS and STEWART G. HOLT.

L. P. Shackleford, being first duly sworn, on oath deposes and says:

I am one of the counsel for the defendant C. M. Summers in the above-entitled cause; that I have hastily read over the indictment of one hundred and

forty pages filed herein on the fifth day of January, 1912; that about the sixth day of July, 1911, I was called into consultation with reference to a change in the officers of the First National Bank, and that from that time until the latter part of August, 1911, I was from day to day engaged in matters concerning the reorganization of said bank and concerning the connection of the defendant C. M. Summers with the said bank; that I had occasion to discuss the same with a great many people in Juneau and in this part of Southeastern Alaska during said period and since; that I have made careful investigation of the state of public mind north of Wrangell Narrows with reference to the question as to whether jurors could be procured in the First Division of Alaska, north of Wrangell Narrows, who had not formed and expressed a firm conviction as to the guilt or innocence of the defendant here; that the circumstances or alleged circumstances connected with the change in the officers of the First National Bank in Juneau, Alaska, has been the most discussed topic in Southeastern Alaska since the sixth of July, 1911; that from the investigation made by me and from the information received by numerous and reliable persons in [154] the First Division of Alaska, it appears that there are practically no persons eligible as jurors north of Wrangell Narrows, in Southeastern Alaska, who have not met and discussed the question of guilt or innocence of the defendant and expressed a decided opinion thereon; that the matter has been discussed freely in public print in the vicinity of Juneau, Haines, Skagway and Douglas, Alaska; that the defendant is a man of wide

acquaintance in the District, and a man of prominence in the community, and for a number of years past many transactions with which he was identified have been discussed in the vicinity of Juneau, Alaska, publicly and with considerable acrimony; that for the past four years a number of people in this portion of the First Division of Alaska have not only spent their time in discussing the merits of this case but in circulating and discussing adverse reports of the defendant; and that affiant says that it would be impossible for the defendant to secure a fair and impartial trial by a jury in this portion of the First Division of the District of Alaska.

Affiant further says that it will take three or four months to prepare for the trial under the said indictment and to secure the necessary data and information with which to be informed and meet the allegations in the indictment, but that in his opinion the defendant could be prepared and ready for trial at the proposed May term of this Court at Ketchikan, Alaska.

LEWIS P. SHACKLEFORD.

Subscribed and sworn to before me this 8th day of January, A. D. 1912.

[Notarial Seal] W. S. BAYLESS,
Notary Public for Alaska.

[Endorsed]: Filed Jan. 8, 1912. E. W. Pettit, Clerk. By ————, Deputy. [155]

[Affidavit of B. L. Thane in Support of Motion to Change Place of Trial.]

District Court for the District of Alaska, Division Number One, at Juneau.

THE UNITED STATES OF AMERICA

vs.

C. M. SUMMERS and STEWART G. HOLT.

United States of America,
District of Alaska,—ss.

B. L. Thane, being first duly sworn, on oath deposes and says:

That I am a resident of the District of Alaska, residing at Juneau, Alaska; that the change in the management of the First National Bank of Juneau, Alaska, in July, 1911, and the charges of irregularities in the conduct of said bank with reference particularly to the defendant, C. M. Summers, in the above-entitled action have been a matter of public and private discussion in Southeastern Alaska ever since said time and up until the present time; that I have talked with a number of people in that portion of the First Division of the District of Alaska north of Wrangell Narrows, and find that public sentiment thereon and private opinions of members of the community, as to the guilt or innocence of the defendant have become so fixed that practically no person qualified for jury duty in that portion of the First Division north of Wrangell Narrows could fairly serve upon a jury in the trial of the said defendant, for the reason that their opinions have be-

come fixed with reference to the matters covered by the indictment on file herein; that the topic as to the guilt or innocence of the defendant has been the most discussed topic in this portion of Alaska since the sixth of July, 1911, and that I do not know of any persons who have not refrained from discussing said topic and announcing an opinion [156] thereon; that in my opinion a fair, impartial and unbiased jury could not be secured from eligible jurors north of Wrangell Narrows.

B. L. THANE.

Subscribed and sworn to before me this 8th day of January, A. D. 1912.

[Notarial Seal] W. S. BAYLESS,
Notary Public for Alaska.

[Endorsed]: Original No. ——. In the District Court for the District of Alaska, Division No. 1, at Juneau. U. S. of America, Plaintiff, vs. C. M. Summers and S. G. Holt, Defendants. Affidavit. Lewis P. Shackleford, Attorney for Defts. Office: Juneau, Alaska. Filed Jan. 8, 1912. E. W. Pettit, Clerk. By ————, Deputy. [157]

[Affidavit of J. P. Olds in Support of Motion to Change Place of Trial.]

District Court for the District of Alaska, Division Number One, at Juneau.

THE UNITED STATES OF AMERICA

vs.

C. M. SUMMERS and STEWART G. HOLT.

United States of America,
District of Alaska,—ss.

J. P. Olds being first duly sworn, on oath deposes and says:

That I am a resident of the District of Alaska, residing at Juneau, Alaska; that the change in the management of the First National Bank of Juneau, Alaska, in July, 1911, and the charges of irregularities in the conduct of said bank with reference particularly to the defendant, C. M. Summers, in the above-entitled action, have been a matter of public and private discussion in Southeastern Alaska ever since said time and up until the present time; that I have talked with a number of people in that portion of the First Division of the District of Alaska north of Wrangell Narrows and find that public sentiment thereon and private opinions of members of the community as to the guilt or innocence of the defendant have become so fixed that practically no person qualified for jury duty in that portion of the First Division north of Wrangell Narrows could fairly serve upon a jury in the trial of the said defendant, for the reason that their opinions have become fixed with reference to the matters covered by the indictment on file herein; that the topic as to the guilt or innocence of the defendant has been the most discussed topic in this portion of Alaska since the sixth of July, 1911, and that I do not know of any persons who have not refrained from discussing said topic and announcing an opinion [158] thereon; that in my opinion a fair, impartial and unbiased jury could not

be secured from eligible jurors north of Wrangell Narrows.

J. P. OLDS.

Subscribed and sworn to before me this 8th day of January, A. D. 1912.

[Notarial Seal] W. S. BAYLESS,
Notary Public for Alaska.

[Endorsed]: Original. No. ——. In the District Court for the District of Alaska, Division No. 1, at Juneau. U. S. of America, Plaintiff, vs. C. M. Summers and H. G. Holt, Defendants. Affidavit. Lewis P. Shackleford, Attorney for Defts. Office: Juneau, Alaska. Filed Jan. 8, 1912. E. W. Pettit, Clerk. By ————, Deputy. **[159]**

[Affidavit of H. J. Raymond in Support of Motion to Change Place of Trial.]

District Court for the District of Alaska, Division Number One, at Juneau.

THE UNITED STATES OF AMERICA

vs.

C. M. SUMMERS and STEWART G. HOLT.

United States of America,
District of Alaska,—ss.

H. J. Raymond, being first duly sworn, on oath deposes and says:

That I am a resident of the District of Alaska, residing at Juneau, Alaska; that the change in the management of the First National Bank of Juneau, Alaska, in July, 1911, and the charges of irregulari-

ties in the conduct of said bank with reference particularly to the defendant, C. M. Summers, in the above-entitled action, have been a matter of public and private discussion in Southeastern Alaska ever since said time and up until the present time; that I have talked with a number of people in that portion of the First Division of the District of Alaska north of Wrangell Narrows and find that public sentiment thereon and private opinions of members of the community as to the guilt or innocence of the defendant have become so fixed that practically no person qualified for jury duty in that portion of the First Division north of Wrangell Narrows could fairly serve upon a jury in the trial of the said defendant, for the reason that their opinions have become fixed with reference to the matters covered by the indictment on file herein; that the topic as to the guilt or innocence of the defendant has been the most discussed topic in this portion of Alaska since the sixth of July, 1911, and that I do not know of any persons who have not refrained from discussing said topic and announcing an opinion [160] thereon; that in my opinion a fair, impartial and unbiased jury could not be secured from eligible jurors north of Wrangell Narrows.

H. J. RAYMOND.

Subscribed and sworn to before me this 8th day of January, A. D. 1912.

[Notarial Seal] W. S. BAYLESS,

Notary Public for Alaska.

[Endorsed]: Original. No. ——. In the District Court for the District of Alaska, Division No.

1, at Juneau. U. S. of America, Plaintiff, vs. C. M. Summers and H. G. Holt. Affidavit. Lewis P Shackleford, Attorney for Defts. Office: Juneau, Alaska. Filed Jan. 8, 1912. E. W. Pettit, Clerk. By ————, Deputy. [161]

[Affidavit of J. R. Whipple in Support of Motion to Change Place of Trial.]

District Court for the District of Alaska, Division Number One, at Juneau.

THE UNITED STATES OF AMERICA

vs.

C. M. SUMMERS and STEWART G. HOLT.

United States of America,
District of Alaska,—ss.

J. R. Whipple, being first duly sworn, on oath deposes and says:

That I am a resident of the District of Alaska, residing at Juneau, Alaska; that the change in the management of the First National Bank of Juneau, Alaska, in July, 1911, and the charges of irregularities in the conduct of said bank with reference particularly to the defendant, C. M. Summers, in the above-entitled action, have been a matter of public and private discussion in Southeastern Alaska ever since said time and up until the present time; that I have talked with a number of people in that portion of the First Division of the District of Alaska north of Wrangell Narrows and find that public sentiment thereon and private opinions of members of the community as to the guilt or innocence of the

defendant have become so fixed that practically no person qualified for jury duty in that portion of the First Division north of Wrangell Narrows could fairly serve upon a jury in the trial of the said defendant, for the reason that their opinions have become fixed with reference to the matters covered by the indictment on file herein; that the topic as to the guilt or innocence of the defendant has been the most discussed topic in this portion of Alaska since the sixth of July, 1911, and that I do not know of any persons who have not refrained from discussing said topic and announcing an opinion **[162]** thereon; that in my opinion a fair, impartial and unbiased jury could not be secured from eligible jurors north of Wrangell Narrows.

J. R. WHIPPLE.

Subscribed and sworn to before me this 8th day of January, A. D. 1912.

LEWIS P. SHACKLEFORD,
Notary Public for Alaska.

[Endorsed]: Original. No. ——. In the District Court for the District of Alaska, Division No. 1, at Juneau. U. S. of America, Plaintiff, vs. C. M. Summers and S. G. Holt, Defendants. Affidavit. Lewis P. Shackleford, Attorney for Defts. Office: Juneau, Alaska. Filed Jan. 8, 1912. E. W. Pettit, Clerk. By ————, Deputy. **[163]**

In the District Court for the District of Alaska, Division Number One, at Juneau.

No. 821–B.

UNITED STATES

vs.

C. M. SUMMERS and STEWART G. HOLT.

Order [in the Matter of Setting for Trial].

Now, on this day, this cause came on to be heard upon the motion of defendant C. M. Summers to change the place of trial of said C. M. Summers to Ketchikan, Alaska, at the contemplated May, 1912, Term, at that place; and after argument had by the United States Attorney, John Rustgard, and Messrs. Shackleford and Bayless, counsel for defendant C. M. Summers, the Court being fully advised in the premises, grants said motion, and this case is continued until to-morrow, January 9, 1912, to determine time for setting for trial.

Dated Monday, January 8, 1912.

THOMAS R. LYONS,
Judge.

(Criminal Journal, p. 25.) **[164]**

In the District Court for the District of Alaska, Division Number One, at Juneau.

No. 821–B.

UNITED STATES

vs.

C. M. SUMMERS and STEWART G. HOLT.

Order [Setting Cause for Trial].

The motion for change of venue of defendant C. M. Summers herein having heretofore been granted and the matter of setting time for trial of said C. M. Summers continued to this day, the Court being fully advised in the premises continues the time for setting for trial as to defendant C. M. Summers to the first day of an anticipated Special May, 1912, Term of this court, to be held at Ketchikan, Alaska.

Dated Tuesday, January 9, 1912.

THOMAS R. LYONS,
Judge.

(Criminal Journal, p. 29.) **[165]**

In the United States District Court for the District of Alaska, Division Number One.

No. 821–B.

UNITED STATES OF AMERICA

vs.

C. M. SUMMERS and STEWART G. HOLT.

Order [Re Subpoena to P. P. Floyd].

WHEREAS the following stipulation has been entered into in the above-entitled cause by and between John Rustgard, as attorney for plaintiff, and Lewis P. Shackleford, as attorney for the defendants, to wit:

"Whereas one of the employees of the United States Cable Office at Juneau has been subpoenaed as a witness on behalf of the Govern-

ment to appear at Ketchikan on the 6th day of May, 1912, and there produce all the telegrams sent by the First National Bank of Juneau to the Anglo-London Paris National Bank of San Francisco, California, during the last four years and up to the first day of July, 1911, and

"Whereas none of the employees of said cable office can appear at Ketchikan at said time without great inconvenience and without irreparable loss to themselves,

"NOW, THEREFORE, for the purpose of rendering it unnecessary for either employee of said office to appear at said time and place in response to said subpoena, it is hereby stipulated and agreed by and between the parties to the above-entitled cause, by and through John Rustgard, Esq., acting for and on behalf of the plaintiff, and by and through Louis P. Shackleford, acting for and on behalf of defendants, and with their consent, that the hereto attached telegrams numbered from No. 1 to No. 38, inclusive, are original records on file in the United States Signal Service Office, otherwise known as the Cable Office, at Juneau, Alaska, and that they have been on file in said office since the date of each dispatch respectively; that said dispatches were received at said Cable Office at the date indicated upon said dispatch; that each was so received for transmission by telegraph to the addressee at San Francisco, California; that the pencil writings on each of said telegrams or dispatches are marks and nota-

tions made by the employee of the Cable Office or Signal Service Office at Juneau who received and transmitted such dispatch; that they are all the telegrams sent by First National Bank of Juneau to the Anglo-London Paris National Bank of San Francisco sent during period covered by said dispatches; that said dispatches were filed for transmission and paid for by and on behalf of the First National Bank of Juneau, Alaska, and that the facts above stated will be admitted by the defendants upon the trial in the above-entitled cause.

"IT IS FURTHER AGREED that the above stipulation, together with the attached dispatches, may be delivered **[166]** by Paul Floyd, the person in charge of the United States Signal Service Office at Juneau to R. E. Robertson, Private Secretary to the Honorable Thomas R. Lyons, and may be by him safely kept and upon the trial of the said cause at Ketchikan produced and offered in evidence together with this stipulation.

"Dated this 6th day of April, A. D. 1912, at Juneau, Alaska."

And WHEREAS the office in charge of the military cable in Alaska and the files referred to in the said stipulation requires that before the said files are delivered to R. E. Robertson pursuant to said stipulation an order be issued by this Court directing that the same may be done,

NOW, THEN, IT IS THEREFORE ORDERED upon motion of the said attorney above named for

plaintiff as well as for the defendant that the said telegrams mentioned in said stipulation from No. 1 to No. 38, inclusive, may be delivered by the operator in charge of the United States Signal Corps at Juneau, Alaska, to the said R. E. Robertson and to be held by the said Robertson subject to the orders of this Court and to be returned when used by said Court to the operator in charge of the said United States Signal Corps at Juneau, Alaska.

Done in open court this 23d day of April, A. D. 1912, at Juneau, Alaska.

THOMAS R. LYONS,
District Judge.

Entered court journal, No. D, pages 187–8.

[Endorsed]: No. 821–B. In the District Court of the United States for the District of Alaska, Division Number One. United States of America vs. C. M. Summers and Stewart G. Holt. Order. Filed April 23, 1912. E. W. Pettit, Clerk. **[167]**

In the District Court for the District of Alaska, Division Number One, at Juneau.

No. 821–B.

UNITED STATES

vs.

C. M. SUMMERS and STEWART G. HOLT.

Order [Transferring Cause to Ketchikan].

Upon application of John Rustgard, United States Attorney, it is ordered that all papers and files in the above-entitled cause, relating to defendant C. M.

Summers, be transferred from the office of the clerk of the court at Juneau to the office of said clerk at Ketchikan.

Dated Monday, April 29, 1912.

THOMAS R. LYONS,
Judge.

(Criminal Journal, p. 189.) [168]

In the District Court for the District of Alaska, Division Number One, at Ketchikan.

No. 277–K. B.

UNITED STATES

vs.

C. M. SUMMERS and STEWART G. HOLT.

Order Continuing Trial.

On this day, upon request of the defendant, by his attorney, W. S. Bayless, Esq., the Government being represented by John Rustgard, United States Attorney, it is ORDERED that this cause be, and it is hereby continued until Monday, May 13, 1912, at ten o'clock A. M.

Dated Monday, May 6, 1912.

THOMAS R. LYONS,
Judge.

(Journal L. L. 3, page 64.) [169]

In the District Court for the District of Alaska, Division Number One, at Ketchikan.

No. 821–B—277–K. B.

UNITED STATES

vs.

C. M. SUMMERS et al.

Order Continuing Trial.

Upon application of W. S. Bayless, Esquire, of counsel for defendant, John Rustgard, United States Attorney, appearing for the Government, it is ordered that the trial of defendant C. M. Summers be, and it is hereby, continued to Friday, May 17, 1912.

Dated Monday, May 13, 1912.

THOMAS R. LYONS,
Judge.

(Journal L. L. 3, page 80.) [170]

In the District Court for the District of Alaska, Division Number One, at Ketchikan.

No. 277–K. B.

UNITED STATES

vs.

C. M. SUMMERS et al.

Order Continuing Trial.

Now, on this day it appearing that the trial of Cause No. 278–K. B., United States vs. Cornilius Carrasco, is now in progress, the trial of C. M. Sum-

mers, one of the defendants herein, is hereby continued until ten o'clock A. M. to-morrow.

Dated Friday, May 17, 1912.

THOMAS R. LYONS,
Judge.

(Journal L. L. 3, page 97.) [171]

In the District Court for the District of Alaska, Division Number One, at Ketchikan.

No. 277–K. B.

UNITED STATES

vs.

C. M. SUMMERS et al.

Order Overruling Demurrer After Resubmission.

Now comes John Rustgard, United States Attorney; comes also the defendant C. M. Summers, in person, and by his attorney, L. P. Shackleford, Esquire. Whereupon said defendant, by and through his counsel, asks leave of the Court to withdraw his plea of "Not Guilty," heretofore duly entered herein, and to resubmit his demurrer to the indictment heretofore filed herein; and the United States Attorney not objecting thereto;

IT IS ORDERED that defendant be, and he is hereby, permitted to withdraw his plea of not guilty, as aforesaid, heretofore made and entered;

Whereupon the said demurrer of defendant C. M. Summers is again presented to the Court, and after arguments by counsel and the Court being fully advised in the premises;

IT IS ORDERED that said demurrer be, and the same is hereby, overruled, to which order overruling said demurrer, and each and every part thereof, defendant by counsel excepts and said exceptions are allowed.

Dated Saturday, May 18, 1912.

THOMAS R. LYONS,
Judge.

(Journal L. L. 3, pages 99–100.) **[172]**

In the District Court for the District of Alaska, Division No. One, at Ketchikan.

No. 277–K. B.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

C. M. SUMMERS and S. G. HOLT,
Defendants.

Motion [for Continuance].

Comes now C. M. Summers, one of the defendants in the above-entitled action, by his attorney, and moves for a continuance of this cause for a period of 60 days or more to such time and place as the Court may name.

This motion is based upon the records and files herein and upon the affidavits of C. M. Summers and L. P. Shackleford hereto attached.

LEWIS P. SHACKLEFORD,
Attorney for Defendant.

Filed May 17, 1912. E. W. Pettit, Clerk. **[173]**

In the District Court for the District of Alaska, Division No. One, at Ketchikan.

No. —— -A.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

C. M. SUMMERS and S. G. HOLT,

Defendants.

Affidavit of C. M. Summers [in Support of Motion for Continuance].

United States of America,
District of Alaska,—ss.

C. M. Summers, being first duly sworn, on oath deposes and says: I am one of the defendants in the above-entitled cause; that the indictment herein was returned about the 6th day of January, 1912; that L. P. Shackleford has had sole charge of the conduct of my defence herein, and that I have consulted with no one else concerning the merits of the same. That shortly after the return of the said indictment I was advised by the said L. P. Shackleford that I had a good and sufficient ground for demurrer to said indictment under section 43, Part II of the Alaska Code of Criminal Procedure and under other sections of said Code, and a demurrer was submitted and overruled and an exception taken under said advice. That thereafter and in the early part of the month of February, 1912, I had a further consultation with my said attorney in Portland, Oregon, in which he advised me that a trial would not be neces-

sary, and that I had my option to have judgment go against me and appeal without trial pursuant to the provisions of section 97 of said Code, and that it would not be necessary to prepare for a trial upon the merits at this time if such option were exercised, and I [174] therefore instructed my said attorney to proceed in that manner if in his judgment he deemed such action proper, and that no efforts have been made since said time to prepare for the said trial of this cause upon the merits, and no witnesses have been interviewed or their presence sought. That I again had a conference with my said attorney on or about the 16th day of April, 1912, at Portland, Oregon, and was advised by him to stand upon said demurrer and have judgment go against me under the provisions of section 97 of said Code, and then appeal. That I was not aware that any other section was claimed to be in conflict with section 97 of said Code, and continued to rely upon said advice of said attorney. That I was advised by my said attorney at said time that he had important engagements in the eastern part of the United States which would prevent his attending the Ketchikan term of this court in May, 1912, and that my said attorney prepared a form of election to stand upon the said demurrer herein and have judgment go against me herein, and the form of orders and exceptions to be taken so that this cause might proceed expeditiously to appeal without trial on the merits; and my said attorney requested me to take these said forms to W. S. Bayless, an attorney of this Bar, with instructions to proceed accordingly, and that on or about the 1st

day of May, 1912, I announced my intention to stand upon said demurrer as aforesaid through said W. S. Bayless, and was completely surprised by a contention on the part of said United States Attorney that section 97 of said Code was inapplicable and that a trial upon the merits must be had at Ketchikan in the month of May, 1912. Whereupon I caused my said attorney, L. P. Shackleford, to be informed, and requested his immediate presence at Ketchikan, Alaska, and a continuance was requested until he could arrive, and this affidavit is made immediately upon his arrival at Ketchikan, Alaska. That I am totally unprepared to proceed with the trial upon the merits of said cause at this time, and cannot safely proceed for at least 60 days. That the presence of my said attorney, L. P. Shackleford, is absolutely necessary for a proper defence of said **[175]** cause upon the merits, as he is the only one who is familiar with the details of the transactions involved herein, and that it would take at least 60 days for me to be assured of the attendance of proper witnesses and to properly prepare my case for defence with a new attorney if I were compelled to do so.

That I am ready and willing to stand upon the demurrer herein and have judgment go against me under section 97 of said Code without claiming any other rights under any other section of the laws applicable to the District of Alaska, if any there be, either in this Court or upon appeal therefrom. That I am further ready and willing to waive my right to be tried at Ketchikan, in the District of Alaska, in case

a continuance be granted for a period of 60 days or more.

C. M. SUMMERS.

Subscribed and sworn to before me this 17th day of May, A. D. 1912.

W. S. BAYLESS,
Notary Public for Alaska.

Filed May 17, 1912. E. W. Pettit, Clerk. [176]

In the District Court for the District of Alaska, Division No. One, at Ketchikan.

No. —— -A.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

C. M. SUMMERS and S. G. HOLT,

Defendants.

Affidavit of L. P. Shackleford [in Support of Motion for Continuance].

United States of America,
District of Alaska,—ss.

L. P. Shackleford, being first duly sworn, on oath deposes and says: That I am the attorney for the defendant C. M. Summers in the above-entitled cause; that I have had sole charge and conduct of his case since the finding of the indictment herein; that in the month of April, 1912, I made an examination of the Alaska Code and decided to stand upon the demurrer heretofore presented and filed herein and allow judgment to go against the said defendant C.

M. Summers and appeal therefrom upon the questions raised by the said demurrer herein, pursuant to section 97 of the Alaska Code of Criminal Procedure; and that on or about the 20th of April, 1912, I advised the said defendant C. M. Summers that he had a right to stand upon said demurrer and appeal, and that it would not be necessary to go to trial herein or prepare for trial and to proceed to Juneau and have judgment taken against him, and to request W. S. Bayless, an attorney, to reserve the proper exceptions so that the said case might be promptly appealed. That relying upon said advice no further preparations were made for the defence of said cause and no witnesses subpoenaed for said trial on the part of the defence. That on or about the 1st day of May, 1912, the United States Attorney made the claim that section 97 of said Alaska Code was inapplicable in this cause and that a trial **[177]** must be had instead of standing upon said demurrer. That the contention of the said United States Attorney came as a surprise to affiant and defendant aforesaid, and that at that date it was impossible to prepare said case for a trial on the merits, and to secure the attendance of necessary witnesses during the month of May and complete the said trial prior to the date set for the re-convening of this Court at Juneau on or about the 1st day of June, and that said surprise was due to no negligence on the part of said defendant C. M. Summers, but occurred upon the advice of affiant as his counsel.

That affiant in the meantime has engaged himself to be present in the city of New York as the attor-

ney for B. L. Thane and others on the 25th day of May, 1912, to attend to the passing of titles and exchange of securities in the consolidation of the Oxford Mining Company with the Alaska Gastineau Mining Company, and it is absolutely necessary that affiant be present at said time so that said consolidation may be completed and work proceed upon said mining properties during the mining season of 1912, and that no other person can be engaged to perform said service for the reason that no one else is prepared to do so or is sufficiently familiar with the details involved in said transaction.

That, relying upon said section 97 of said Alaska Code, affiant has also engaged to be in the city of Chicago on the 3d day of June and until the 25th day of June, 1912, upon matters of importance, and that the said defendant C. M. Summers herein has not consulted with any other attorney concerning the merits of this case or its details, and is not in a position to proceed to trial upon the merits without the presence and advice and services of affiant. Affiant further states that he has consulted with said defendant C. M. Summers, and will be prepared to defend said cause after the 10th day of July, 1912, and affiant is informed that if necessary said defendant C. M. Summers is ready to waive his [178] right to a trial at Ketchikan, Alaska, and proceed with the trial at a Juneau term of said Court, or said defendant is willing to stand upon his said demurrer herein and have judgment given against him and proceed with an appeal from the ruling of said Court upon said demurrer.

That if any mistake has been made it has been due to the advice of affiant and to his belief that the Government would not and could not oppose the rendition of judgment under the provisions of section 97 of the Alaska Code of Criminal Procedure.

LEWIS P. SHACKLEFORD.

Subscribed and sworn to before me this 17th day of May, A. D. 1912.

W. S. BAYLESS,
Notary Public for Alaska.

Filed May 17, 1912. E. W. Pettit, Clerk.

Due service of the within motion, affidavit of C. M. Summers and affidavit of L. P. Shackleford is admitted this 17th day of May, 1912.

JNO. RUSTGARD,
U. S. Atty. [179]

In the District Court for the District of Alaska, Division Number One, at Ketchikan.

No. —— B.

UNITED STATES OF AMERICA

vs.

C. M. SUMMERS and S. G. HOLT,

Defendants.

Notice of Election of Defendant C. M. Summers to Stand on Demurrer.

The defendant C. M. Summers, above named, having duly demurred to the indictment on file herein, and the said demurrer having been overruled and the defendant excepting, and the said defendant hav-

ing thereafter, by permission of the Court duly given, withdrawn his plea of not guilty and resubmitted his demurrer on file herein, and the Court having again overruled the said demurrer,

The defendant C. M. Summers now gives his notice of election to stand upon the said demurrer and not further plead and to take advantage of the provisions of section 97 of the Alaska Criminal Code of Procedure, and to submit to judgment thereunder and forthwith take his appeal to the Circuit Court of Appeals for the Ninth Circuit.

C. M. SUMMERS,
Defendant.
LEWIS P. SHACKLEFORD,
Attorney for Defendant.

[Endorsed]: Filed May 20, 1912. E. W. Pettit, Clerk. By H. Malone, Deputy. [180]

In the United States District Court for the District of Alaska, Division Number One.

No. 277–K. B.

UNITED STATES OF AMERICA

vs.

C. M. SUMMERS and STEWART G. HOLT.

Objection to Proceeding Under Sec. 97, Alaska Code.

The defendant C. M. Summers having given notice to stand on his demurrer and to have judgment entered pursuant to the provisions of section 97, Part II of the Alaska Penal Code, the plaintiff objects to the entry of judgment until the cause herein has

been submitted to a jury for trial and a verdict rendered, the plaintiff maintaining that the provisions of said section 97 do not apply to the above-entitled cause but that sections 1026 and 1032 of the Revised Statutes of the United States govern the procedure.

JOHN RUSTGARD,
United States Attorney.

[Endorsed]: Filed May 20, 1912. E. W. Pettit, Clerk. [181]

In the United States District Court for the District of Alaska, Division Number One.

No. 277–K. B.

UNITED STATES OF AMERICA

vs.

C. M. SUMMERS and STEWART G. HOLT.

Affidavit of John Rustgard in Answer to Affidavits of C. M. Summers and Lewis P. Shackleford, and in Opposition to Motion for a Continuance.

United States of America,
District of Alaska,—ss.

John Rustgard, being duly sworn, deposes and says: That he is the United States Attorney for Division Number One, District of Alaska, and as such the attorney for plaintiff in the above-entitled cause. That in support of his opposition to defendant's motion for a continuance in the above-entitled cause deponent submits the following facts:

That the indictment herein was returned and filed on or about the 5th day of January, A. D. 1912. That

immediately thereupon the defendants herein were duly arraigned and each filed his demurrer to each count in said indictment, which demurrers were submitted and in each instance overruled by the Court. That thereupon and on or about the 6th day of January, A. D. 1912, each of the said defendants entered a plea of "not guilty," and the said defendant C. M. Summers immediately demanded a separate trial, which demand was immediately granted by the Court. That immediately thereupon the said defendant Summers moved for a change of venue from Juneau to Ketchikan, in [182] this Division, upon the ground that the prejudice against him at Juneau was so intense that he could not have a fair trial at that place, which motion for a change of venue was granted on or about the 8th day of January, A. D. 1912, and the cause against the said C. M. Summers set for trial at Ketchikan on the 6th day of May, this year. That at said time no suggestion was made to this deponent that the defendant intended in any manner to waive any trial or to have judgment entered under section 97, Part II of the Alaska Code, but that Lewis P. Shackleford stated in open court that he was not ready to go to trial for a considerable time thereafter and would not have opportunity to prepare the defense and be ready for trial until about the month of May. Thus intimating in the presence of the defendant and the Court he expected to have the cause tried upon its merits. And in reliance upon said intimation, this deponent took all the necessary steps to prepare the case for trial on behalf of the Government and to secure the attendance of witnesses.

That as late as the 6th day of April last, deponent had a conference with said Lewis P. Shackleford or W. S. Bayless with reference to said case and Shackleford or Bayless at that time was advised that this deponent was preparing subpoenas for the witnesses for the Government, and that many of these witnesses would have to be brought to Ketchikan from distant places in the States at a great deal of expense to the Government. But that no intimation at that time was made to this deponent that the defendant intended to rely upon and take advantage of the provisions of section 97 of the Alaska Code, and no steps were ever taken by the defendant or either of his counsel to prevent the Government from incurring the expense of preparing for trial and subpoenaing witnesses for this term of court.

That the said cause was called for trial at Ketchikan on the 6th day of this month but that at that time the [183] defendant Summers, through his attorney W. S. Bayless, asked for a continuance of the case until the 13th of this month, upon the statement and the reading of telegrams to the effect that Mr. Shackleford had met with an accident in New York and for that reason had not been able to leave that city in time to be in Ketchikan at the time the case was set for trial, but that he was on his way and would be in this city on or about the 13th of this month. That pursuant to said motion, and over the objection of counsel for the plaintiff, the trial was continued until Monday, the 13th of May, at 10 o'clock in the forenoon.

That at said last named time the said defendant

Summers, by and through his attorney W. S. Bayless, appeared in court and again moved that the case be continued until the 17th of May, stating that Mr. Shackleford had arrived in Seattle from New York on the evening of Friday, the 10th of May, but that through illness he had been unable to take passage for Ketchikan on the steamship "Jefferson," which sailed from Seattle on the evening of Saturday, the 11th of May, and would reach Ketchikan in the morning of the 14th; but that he would take passage on the next boat leaving Seattle, which would be the steamer "City of Seattle," and which latter boat would arrive in Ketchikan on the morning of the 17th, as aforesaid. That at that time in open court the said W. S. Bayless in the presence of the said defendant Summers and as his attorney, read to the court a telegram purporting to be from said Lewis P. Shackleford, wherein the said Shackleford stated that he was very desirous of being present at the trial but that on account of illness aforementioned he had been unable to take any boat prior to the departure of the said steamer "City of Seattle" from the port of Seattle, and that if the Court would continue the case until the morning of the [184] 17th the said Shackleford would not only be ready to go to trial but would help the Government in expediting the trial in every way he could. That pursuant to said motion and upon the said representation aforesaid, but over the objection of counsel for the plaintiff, the case was by the Court continued until 10 o'clock on Friday, the 17th of May, the Court at the same time explicitly and clearly stating that the case

at that time would proceed for trial whether Shackleford was present or not and that no further continuance would be granted.

That the Government in this case has incurred a very heavy expense in preparing for the trial and in securing the attendance of witnesses. That there are now in attendance upon this court as witnesses for the Government: two witnesses from San Francisco, California, 2 from Wenatchee, Washington, one from Chicago, Illinois, 2 from Washington, D. C., one from Skagway, Alaska, and three from Juneau, Alaska.

That deponent does not believe that the said defendant Summers ever intends to have this case tried upon its merits or that he intends at any time to submit any evidence in his own behalf, but that in the reliance upon the validity of his demurrers lies his only hope for an acquittal. That deponent does not believe that the motion for continuance is made in good faith, for the purpose of obtaining or preparing evidence on behalf of the defendant.

Further deponent saith not.

JOHN RUSTGARD.

Subscribed and sworn to before me, this 20th day of May, A. D. 1912.

[Court Seal] E. W. PETTIT,

Clerk of the District Court for the District of Alaska, Division Number One.

[Endorsed]: Filed May 20, 1912. E. W. Pettit, Clerk. [185]

In the District Court for the District of Alaska, Division Number One, at Ketchikan.

No. 277–K. B.

UNITED STATES OF AMERICA

vs.

C. M. SUMMERS and S. G. HOLT,

Defendants.

Affidavit of Louis P. Shackleford.

United States of America,
District of Alaska,
Division Number One,—ss.

Louis P. Shackleford, being first duly sworn on oath, deposes and says: that at ten o'clock A. M., May 20, 1912, John Rustgard, United States Attorney, at the time appointed for hearing the motion for continuance in this case, proceeded to read an affidavit of his which had not previously been filed or served; that in said affidavit it was stated:

> "That as late as the sixth of April, last, deponent had a conference with Louis P. Shackleford with reference to said case, and said Shackleford at that time was advised that this deponent was preparing subpoenas for the witnesses for the Government and that many of these witnesses would have to be brought to Ketchikan from distant places in the United States at a great deal of expense to the government," etc.

Affiant says that he never had any conversation with the District Attorney in the month of March or

April concerning the said case and never discussed it with him in any way, shape or form; that subsequently the said District Attorney amended the said affidavit by adding the words "or W. S. Bayless" after Louis P. Shackleford. Affiant says that W. S. Bayless was not present at the presentation of said motion and not in Ketchikan and that his affidavit on the subject cannot be obtained, but that he has never been advised by the said W. S. Bayless of any such conversation with the said United States Attorney.

Said United States Attorney further made the statement that [186] it was at the time he, the United States Attorney, entered into a stipulation with affiant concerning the testimony of the United States Signal Officer at Juneau. Affiant says that he had no such conversation with the District Attorney, but that the matter arose in the following manner: The United States Signal Officer at Juneau was unwilling to attend the trial and called affiant into the cable office at Juneau and presented to him a stipulation which had been written out by the United States Attorney for the purpose of relieving him, the Signal Officer, from attending the trial, and that at the request of the Signal Officer affiant signed the stipulation.

Affiant further states that the statements contained in the last paragraph of the affidavit of the said United States Attorney are untrue and entirely contrary to the advice which affiant has given to the defendant herein, C. M. Summers, but that affiant has advised the said C. M. Summers that he has a right

to be tried on any charge made against him alone without reference to other charges, and has advised him that it is unsafe for him to go to trial and attempt to meet the fifty-six different charges contained in the indictment herein at one trial; and that no lawyer or any number of counsel can safely prepare for the trial of said cause involving fifty-six different counts and a penalty under the statute ranging from 280 imprisonment years to 560 years' imprisonment.

LEWIS P. SHACKLEFORD.

Subscribed and sworn to before me this 20 day of May, 1912.

[Court Seal] E. W. PETTIT,
Clerk Dist. Court of Alaska, Div. No. One.

[Endorsed]: Filed May 20, 1912. E. W. Pettit, Clerk. [187]

[Minute Order of Court Proceedings Prior to Signing of Sentence.]

In the District Court for the District of Alaska, Division Number One, at Ketchikan.

No. 277–K. B.

UNITED STATES

vs.

C. M. SUMMERS et al.

Now on this day, the United States Attorney, John Rustgard, appearing for the plaintiff, and the defendant C. M. Summers being present in court in person and represented by his attorney, L. P. Shackle-

ford, Esquire; and said defendant C. M. Summers having given notice that he would stand on his demurrer heretofore filed herein and have judgment entered pursuant to the provisions of section 97, Part II of the Alaska Penal Code; and the plaintiff objecting to the entry of judgment until this cause has been submitted to a jury for trial and a verdict rendered herein, the plaintiff maintaining that the provisions of said section 97, Part II, of the Penal Code of Alaska do not apply to the above-entitled cause, but that sections 1026 and 1032 of the Revised Statutes of the United States govern the procedure; after arguments by counsel for both sides, and the Court, being fully advised in the premises, rules that the Federal procedure prevails in all proceedings in this cause; but that the defendant C. M. Summers may waive trial by jury, if he so elects, and have judgment entered against him pursuant to the provisions of section 97, Part II, of the Alaska Penal Code; to which ruling the plaintiff excepts and said exception is allowed.

Whereupon the motion for continuance is withdrawn at the request of defendant C. M. Summers and his counsel, L. P. Shackleford, Esquire.

Thereupon the defendant C. M. Summers is asked by [188] the Court if he is guilty or not guilty of the crime charged against him in the indictment herein, namely, that of violation of section 5209, Revised Statutes of the United States, to which the said defendant C. M. Summers stands mute and refuses to plead herein, electing to stand on his demurrer herein and have judgment rendered against him in

accordance with the provisions of section 97 of the Alaska Penal Code.

Whereupon the defendant C. M. Summers waives time for sentence, but the time for entry of sentence is continued until three o'clock P. M. to-day.

Thereupon at said hour of three o'clock P. M. of this day comes John Rustgard, United States Attorney; comes also the defendant in person and represented by his attorney, L. P. Shackleford, Esquire; whereupon the following Judgment and Sentence in this cause is presented, signed and ordered filed and entered in this cause, to wit:

Dated Tuesday, May 21, 1912.

THOMAS R. LYONS,
Judge.

(Journal L. L. 3, page 103.) [189]

In the United States District Court for the District of Alaska, Division Number One.

No. 277–K.B.

UNITED STATES OF AMERICA

vs.

C. M. SUMMERS and STEWART G. HOLT.

Judgment and Sentence.

An indictment having been duly found and filed in the above-entitled cause against C. M. Summers and Stewart G. Holt, and each of them, charging each of said defendants in fifty-six separate counts with violations of section 5209 of the Revised Statutes of the United States, and the said C. M. Summers having filed and submitted his demurrer to each of said

counts in said indictment and to the whole of said indictment, and said demurrer having been by this Court duly and in all respects disallowed and overruled as to each of said counts and to the whole of said indictment, and the said defendant C. M. Summers at Ketchikan, in said Division and District, on Monday, the 20th day of May, A. D. 1912, having duly appeared personally in open court, accompanied by his attorney, L. P. Shackleford, and then and there in open court refused to plead to said indictment and given his notice of election to stand upon said demurrer and not further plead and to take advantage of the provisions of section 97 of the Alaska Criminal Code of Procedure and to submit to judgment thereunder, and the plaintiff herein, through and by John Rustgard, Esquire, United States Attorney for Division Number One, District of Alaska, attorney for plaintiff herein, having duly entered his objection to said procedure under said section 97 and requested that a plea of Not Guilty be entered on behalf of the defendant C. M. Summers, and that said defendant be tried upon each count in said indictment before a jury before [190] judgment be entered, and the said objection having been duly overruled by the Court, and said request on the part of plaintiff having after arguments submitted by the respective parties been, on this 21st day of May, A. D. 1912, in open court, at Ketchikan, in said Division and District, in presence of the said defendant C. M. Summers personally, denied:

NOW, THEREFORE, the said C. M. Summers being personally present before this Court, accom-

panied by his attorney, L. P. Shackleford, and having elected to stand on said demurrer and have judgment entered herein, and having refused to plead after such demurrer was disallowed and overruled;

IT IS HEREBY ADJUDGED AND DECREED that the said defendant C. M. Summers is guilty of each offense charged in each count in said indictment herein, and the said defendant C. M. Summers having been asked by the Court whether he has anything to say why sentence herein should not be pronounced against him, and he having declared that he had nothing to say why sentence should not now be pronounced upon him, except that he desired to test his demurrer upon appeal. T. R. L.

IT IS HEREBY FURTHER ORDERED AND ADJUDGED that you, the said C. M. Summers, one of the defendants in the above-entitled cause, in punishment of the offenses aforesaid, of which you have been adjudged guilty as charged, be and you hereby are sentenced to be confined in the United States Penitentiary at McNeil's Island, in the State of Washington, for a period of five years for each of said fifty-six offenses charged in said indictment herein and of which you have been so found guilty, said periods of five years to run concurrently and the entire sentence to be completed upon the service of five years, and you [191] are now and herewith committed to the custody of the United States Marshal for the execution of this sentence, time to commence to run from the time of incarceration in said penitentiary.

Done in open court at Ketchikan, this 21st day of May, A. D. 1912.

THOMAS R. LYONS,
District Judge.

To the whole of which judgment and sentence, and each and every part thereof, and as to each and every count in the indictment, the defendant excepts and his exceptions are allowed.

THOMAS R. LYONS,
District Judge.

Entered Court Journal, No. 3 L. L., pages 103-4.

[Endorsed]: Form No. 680. No. 277-K.B. In the District Court of the United States for the District of Alaska, Division Number One. United States of America, vs. C. M. Summers and Stewart G. Holt. Judgment and Sentence. Filed May 21, 1912. E. W. Pettit, Clerk. By ————, Deputy. [192]

In the District Court for the District of Alaska, Division No. 1.

821-B. or 277-K. B.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

C. M. SUMMERS and S. G. HOLT,
Defendants.

Bond on Writ of Error.

Know All Men by These Presents, that a judgment having been given on the 21st day of May, 1912,

whereby C. M. Summers, one of the defendants above named, was adjudged guilty under each of the fifty-six counts upon the indictment on file herein and condemned to serve the term of five years at the United States Penitentiary at McNeil's Island in the State of Washington, and he having sued out a writ of error and appealed from said judgment, and been duly admitted to bail in the sum of ten thousand dollars:

We, J. R. Heckman, residing at Ketchikan, Alaska, and merchant by occupation, and J. J. Daly, residing at Ketchikan, Alaska, and manufacturer by occupation, and Henry Shattuck, residing at Juneau, Alaska, merchant and manufacturer by occupation, hereby undertake that the above-named C. M. Summers shall in all respects abide and perform the orders and judgments of the Appellate Court upon appeal, or if he fail to do so in any particular that we will pay the United States the sum of ten thousand dollars.

Dated at Ketchikan, Alaska, May 21st, 1912.

J. R. HECKMAN.
J. J. DALY.
HENRY SHATTUCK.

Taken and acknowledged before me the day and year above written.

[Court Seal] THOMAS R. LYONS,
Judge District Court, District of Alaska, Division No. 1. [193]

The United States of America,
District of Alaska,—ss.

J. R. Heckman, J. J. Daly and Henry Shattuck, each being first duly sworn, on oath deposes and says, each for himself:

I am a resident within the District of Alaska, but no counselor, or attorney, marshal, clerk of any court, or other officer of any court. That I am worth the sum of six thousand seven hundred dollars, exclusive of property exempted from execution, and over all just debts and liabilities.

J. R. HECKMAN.
J. J. DALY.
HENRY SHATTUCK.

Subscribed and sworn to before me this 21st day of May, 1912.

[Court Seal] THOMAS R. LYONS,
District Judge, First Division, District of Alaska.

[Endorsed]: No. 821–B—277–K. B. In the District Court for the District of Alaska, Division No. 1. United States, vs. C. M. Summers and Stewart G. Holt. Bond on Writ of Error by C. M. Summers. Filed May 21, 1912. E. W. Pettit, Clerk. **[194]**

In the District Court for the District of Alaska, Division No. 1.

No. 277–K. B.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

C. M. SUMMERS and S. G. HOLT,

Defendants.

Petition for Writ of Error and Order Allowing Same.

C. M. Summers, defendant in the above-entitled cause, feeling himself aggrieved by the judgment of the Court entered on the 21st day of May, 1912, adjudging him guilty of each of the fifty-six counts under the indictment herein and condemning him to imprisonment for the period of five years, now petitions the said court for an order allowing the defendant a writ of error to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided, to review the said judgment and proceedings.

Dated at Ketchikan, Alaska, May 21st, 1912.

LEWIS P. SHACKLEFORD,
Attorney for Defendant C. M. Summers.

Now, on this 21st day of May, 1912, it is ordered that the writ of error above prayed for be allowed, and it is further ordered that the said writ of error shall be and operate as a supersedeas, and that ex-

ecution of judgment herein be suspended forthwith.

THOMAS R. LYONS,

Judge of the District Court for the District of Alaska, Division No. 1.

Entered Court Journal, No. L. L. 3, Page 105.

[Endorsed]: Filed May 21, 1912. E. W. Pettit, Clerk. By ————, Deputy. [195]

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 277–K. B.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

C. M. SUMMERS and S. G. HOLT,

Defendants.

Assignment of Errors.

Comes now the defendant, C. M. Summers, in the above-entitled action, and assigns the following errors as having been committed by the Court in the proceedings in the above-entitled action upon which the defendant intends to and does rely in prosecuting his writ of error herein.

First: The Court erred in overruling the demurrer of the said defendant to the indictment as a whole.

Second: The Court erred in overruling the demurrer to the indictment as a whole on the first ground specified in the demurrer.

Third: The Court erred in overruling the demurrer to the indictment on the second ground specified in the demurrer.

Fourth: The Court erred in overruling the demurrer to the indictment on the third ground specified in the demurrer.

Fifth: The Court erred in overruling the demurrer to the indictment on the fourth ground specified in the demurrer.

Sixth: The Court erred in overruling the demurrer to each and every one of the fifty-six counts in the indictment (a) as a whole, (b) on the first ground specified, (c) on the second ground specified, (d) on the third ground specified, (e) on the fourth ground specified.

Seventh: The Court erred in entering judgment against the defendant herein. **[196]**

Eighth: The Court erred in entering judgment against the defendant herein upon each and every one of the fifty-six counts in the indictment, either jointly or severally, as to each of said counts.

Ninth: The Court erred in sentencing the defendant herein under said judgment.

Tenth: The defendant further alleges that the judgment is erroneous and the Court erred in allowing the indictment to stand herein and judgment to be entered thereon for the reason that the indictment herein charges more than one crime, to wit: fifty-six crimes, and violated section 43 of the Alaska Criminal Code of Procedure, chapter 7, and section 90, chapter 10, both in allowing the indictment to stand against the demurrer of the defendant and in proceeding to judgment on the various counts in

the said indictment and judging on more than one crime.

LEWIS P. SHACKLEFORD,
Attorney for the Defendant.

[Endorsed]: Filed May 21, 1912. E. W. Pettit, Clerk. By ————, Deputy. **[197]**

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 277–K. B.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

C. M. SUMMERS and S. G. HOLT,
Defendants.

Writ of Error.

United States of America,—ss.

The President of the United States of America, to the Honorable, the Judge of the District Court for the District of Alaska, First Division: Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, which is in the said District Court before you, between the United States of America, Plaintiff, and C. M. Summers, defendant, a manifest error hath happened to the great damage of the defendant C. M. Summers, plaintiff in error, as by his complaint appears.

We *be* willing that error, if any hath been, should duly be corrected and full and speedy justice be

done to the party aforesaid in this behalf, do command you that then under your seal you send the record and proceedings aforesaid and all things concerning the same to the United States Circuit Court of Appeals for the Ninth Circuit, in the city and county of San Francisco, State of California, together with this Writ, so as to have the same **[198]** at said place in the said Circuit Court within thirty days from the date of this Writ, that the record and proceedings aforesaid being inspected the Circuit Court of Appeals may cause further to be done therein to correct these errors as according to the right and the laws and customs of the United States of America should be done.

Witness the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States, this 21st day of May, 1912.

Witness the hand and seal of the District Court for the District of Alaska, First Division, at the clerk's office at Ketchikan, Alaska, this 21st day of May, 1912.

[Seal] E. W. PETTIT,

Clerk of the District Court for the District of Alaska, First Division.

Allowed this 21st day of May, 1912.

THOMAS R. LYONS,

Judge of the District Court for the District of Alaska, First Division.

Due service of the foregoing Writ of Error is hereby admitted this 21st day of May, 1912.

JOHN RUSTGARD,

United States Attorney for the District of Alaska, First Division. **[199]**

[Endorsed]: No. ——. In the Circuit Court of the United States for the Ninth Circuit. United States of America vs. C. M. Summers and S. G. Holt. Writ of Error. Filed May 21, 1912. E. W. Pettit, Clerk. By ————, Deputy. **[200]**

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 277–K. B.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

C. M. SUMMERS and S. G. HOLT,

Defendants.

Citation.

United States of America,—ss.

The President of the United States of America, to the United States and to John Rustgard, Esquire, the District Attorney for the District of Alaska, First Division:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, to be held in the City and County of San Francisco, in the State of California, within thirty days from the date of this Citation, pursuant to a Writ of Error filed in the Clerk's office of the District Court for the District of Alaska, First Division, wherein C. M. Summers is plaintiff in error and the United States of America is defendant in error, to show cause, if any there be, why judgment in said Writ of Error mentioned should

not be reversed and speedy justice should not be done to the said C. M. Summers in that behalf.

Witness the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States, this 21st day of May, [201] 1912.

THOMAS R. LYONS,

Judge of the District Court for the District of Alaska, First Division.

[Seal] Attest: E. W. PETTIT,

Clerk of the District Court for the District of Alaska, First Division.

Due service of the foregoing Citation is hereby admitted this 21st day of May, 1912.

JOHN RUSTGARD,

United States Attorney for the District of Alaska, First Division. [202]

[Endorsed]: No. ——. In the Circuit Court of the United States for the Ninth Circuit. United States of America vs. C. M. Summers and S. G. Holt. Citation. Filed May 21, 1912. E. W. Pettit, Clerk. By ————, Deputy. [203]

In the District Court for the District of Alaska, Division Number One, at Ketchikan.

No. 277–K. B.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

C. M. SUMMERS and S. G. HOLT,

Defendants.

Order [Extending Time for Filing Transcript of Record].

On the application of L. P. Shackleford, attorney for the defendant C. M. Summers herein, IT IS ORDERED that the time for filing the transcript of record herein be, and the same is hereby, extended until the fifteenth day of August, 1912.

AND IT IS FURTHER ORDERED that all of the records and files herein, including the journal entries, are made a part of the record herein and shall be and constitute the Bill of Exceptions, and that the clerk may certify the same as a part of the Bill of Exceptions.

Done in open court at Ketchikan, Alaska, May 21st, 1912.

THOMAS R. LYONS,
Judge.

(Journal L. L. 3, page 105.)

[Endorsed]: Filed May 21, 1912. E. W. Pettit, Clerk. By ————, Deputy. **[204]**

In the District Court for the District of Alaska, Division Number One, at Juneau.

No. 821–B.—277–K.B.

UNITED STATES OF AMERICA,
Plaintiff and Defendant in Error,

vs.

C. M. SUMMERS,
Defendant and Plaintiff in Error.

Clerk's Certificate.

I, E. W. Pettit, Clerk of the District Court for the District of Alaska, Division Number One, do hereby certify that the foregoing and hereto attached two hundred four pages of typewritten matter, numbered from one to two hundred four, both inclusive, constitute a full, true and correct copy of the record, and the whole thereof, prepared in accordance with the praecipe of defendant and plaintiff in error and also in accordance with the Order of this Court made and entered May 21, 1912, on file in my office and made a part hereof, in Cause No. 821–B, 277–K. B., of the above-entitled court wherein the United States of America is plaintiff and defendant in error; and C. M. Summers is defendant and plaintiff in error.

I do further certify that the said record is by virtue of the Writ of Error and Citation issued in this cause, and the return thereof in accordance therewith.

I further certify that this transcript was prepared by me in my office, and that the cost of preparation, examination and certificate, amounting to ninety-three and 35/100 ($93 35/100) dollars, will be paid to me by the attorneys for the defendant and plaintiff in error.

In witness whereof, I have hereunto set my hand and affixed the seal of the above-entitled court this 3d day of August, A. D. 1912.

[Seal] E. W. PETTIT,

Clerk of District Court, Dist. of Alaska, Division No. 1. **[205]**

[Endorsed]: No. 2177. United States Circuit Court of Appeals for the Ninth Circuit. C. M. Summers, Plaintiff in Error, vs. The United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Alaska, Division No. 1.

Received August 10, 1912.

F. D. MONCKTON,
Clerk.

Filed August 29, 1912.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

C. M. SUMMERS,

Plaintiff in Error,

vs.

No. 2177

UNITED STATES OF AMERICA,

Defendant in Error.

UPON WRIT OF ERROR FROM THE DISTRICT COURT OF THE DISTRICT OF ALASKA, DIVISION NUMBER ONE.

BRIEF OF ~~DEFENDANT~~ *Plaintiff* IN ERROR

L. P. SHACKLEFORD,

SHACKLEFORD & BAYLESS,

Attorneys for Plaintiff in Error.

Filed this day of A. D. 1912.

Clerk.

By Deputy Clerk.

The Bell Press, Printers, Tacoma, Wash.

FILED

Syllabus Index to Brief

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Indictment in this case charged the defendant with fifty-six separate and distinct crimes under Section 5209 of the Revised Statutes relating to National Banks .... 3 - 4

Defendant demurred to the indictment on the ground that the same violated the Alaska Statute prohibiting the statement of more than one crime in one indictment. See Carter's Alaska Code, p. 52, Sec. 43. This demurrer was overruled and the defendant elected to stand upon his demurrer and refused to plead further, was adjudged guilty of each one of the fifty-three separate and distinct crimes charged against him in the indictment and sentenced accordingly, without trial, in accordance with Sec. 97, Alaska Code Criminal Procedure .... 4 - 6

The question involved in the case is as to whether Section 1024 of the Revised Statutes, providing for joinder of separate offenses in an indictment, or Section 43 of the Alaska Code of Criminal Procedure controls in the District of Alaska 7

1. Section 1024 of the Revised Statutes first became a law of the United States by virtue of Act of Congress of February 26, 1853, 10 Stats. at Large, pp. 161-9. The scope of the Act was to regulate fees and costs of clerks, marshals and attorneys of the "Circuit and District Courts of the United States" in "the several states." This Act was inoperative in the territories and in Alaska...... 9

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a. Because Alaska is not a Circuit or District Court of the United States. See *McAllister vs. U. S.*, 141 U. S. 174; *The Coquitlam*, 163 U. S. 346; *Corbus vs. Leonhardt*, 114 Fed., p. 10; *U. S. vs. Ball*, 147 Fed. 36 11

b. To further show that the Act of February 26, 1853, had no application to the territories, Chapter 175, Statutes at Large, Vol. 10, p. 671, is cited, wherein the operation of the statute with reference to the schedule of fees was specifically extended to three territories, to-wit: Minnesota, Utah and New Mexico; also 22 Statutes at Large, page 344, extending the operation of Act of February 26, 1853, to territories of New Mexico and Arizona after the creation of Arizona, and also 22 Statutes at Large, page 344, extending the fees provided for in the Act to the compensation of the Clerk of the Supreme Court of the District of Columbia, and also Section 9, Act of May 17, 1884, which did *not* extend the Act of 1853 to the District of Alaska......... 16

c. Between 1851 and 1878 all states and territories west of the continental divide adopted statutes prohibiting the joinder of more than one offense in an indictment. The states and territories referred to are Arizona, California, Idaho, Montana, Nevada, Utah, Washington and Oregon 18

d. March 22, 1882, realizing that joinder of offenses was not permitted in the western states and territories, when Congress passed the Edmonds Act (Statutes at Large, Vol. 22, page 31), wherein by Section 4 it specially permitted the

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joinder of polygamy and kindred offenses in the territories. The same provision was re-enacted March 4, 1909, in the "Crimes Act," under chapter entitled "Certain Offenses in the Territory." No provision is made anywhere in federal law for the joinder of any other offenses than those just named in the territory... 19

2. By Act of May 17, 1884, the general laws of the state of Oregon were declared to be the law in the District of Alaska. The adoption of the laws of another state as the laws of a territory is not unusual, as in Oklahoma and Indian Territory. The effect of such adoption is to give to those laws the same scope, force and effect as if they had been adopted by a legislative assembly of the territory. *United States vs. Pridgeon*, 153 U. S. 48 20

3. That the practice of the territorial courts is regulated by the local territorial laws, and not by the general procedure applicable to the federal courts, was settled beyond all further question before the passage of the Act of May 17, 1884, providing civil government for Alaska 24

(1872) *Clinton vs. Englebrecht;*
(1874) *Hornbuckle vs. Toombs*, 85 U. S. 648 (in which all previous contrary questions expressly overruled);
(1879) *Good vs. Martin*, 95 U. S. 90;
(1881) *Reynolds vs. U. S.*, 98 U. S. 145;
(1881) *Miles vs. U. S.* 304. Discussed This rule has continued in full force ever since.

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(1885) *Thiede vs. Utah*, 159 U. S. 510; *Welty vs. U. S.*, 76 Pacific 121; *U. S. vs. Haskell*, 169 Fed. 449;

(1906) *Cochran vs. U. S.*, 147 Fed. 206 (opinion by Mr. Justice VanDevanter), holding that doctrine applies even where the prosecution is under a general law of the United States as distinguished from a local or territorial law 28

4. Decisions applicable to Alaska are uniform to the effect that the criminal procedure of Oregon adopted by the Act of 1884 controls in the District of Alaska........ 29

(1891) *U. S. vs. Clark*, 46 Fed. 633 (applying Oregon procedure to prosecution for murder under general laws of the United States applicable to territories);

(1900) *U. S. vs. Jackson*, 102 Fed. 43,, C. C. A. 9th Circuit;

(1902) *Corbus vs. Leonhardt*, 114 Fed. 10, C. C. A. 9th Circuit;

(1900) And finally *Fitzpatrick vs. United States*, 178 U. S. 304. Decision by Mr. Justice Brown that sufficiency of indictment must be tested by laws of Oregon.

5. The same construction has been placed upon the new Alaska Criminal Code and Code of Procedure by the Circuit Court of Appeals for the Ninth Circuit in a criminal case arising subsequent to March 3, 1899. See *Ball vs. U. S.* (1906), 147 Fed. 36..... 32

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6. The proper interpretation of the Alaska Code of 1899:

Section 10 of the Alaska Code of Criminal Procedure reads as follows:

"Sec. 10. Grand Jury, how selected and summoned. That grand juries, to inquire of the crimes designated in title one of this Act, committed or triable within said District, shall be selected and summoned, and their proceedings shall be conducted, in the manner prescribed by the laws of the United States with respect to grand juries of the United States District and Circuit courts, the true intent and meaning of this section being that but one grand jury shall be summoned in each division of the court to inquire into all offenses committed or triable within said district, as well those that are designated in title one of this Act as those that are defined in other laws of the United States."

The lower court construes Section 10 to read as follows:

(1) "That the grand juries, to inquire of the crimes designated in Title one of this Act, committed or triable within said District, shall be selected and summoned in the manner prescribed by the laws of the United States District and Circuit Courts; and (2) grand juries, to inquire of crimes defined in **other laws** of the United States, committed or triable within said District, shall be selected and summoned **and their proceedings** shall be conducted in the manner prescribed by the laws of the United States with respect to grand juries of the United States District and Circuit Courts; (3) the true intent and meaning of this section being that but one grand jury shall be summoned in each division of the court to inquire into all offenses committed or triable within said district, as well those that are designated in Title one of this Act as those that are defined in other laws of the United States."

After having attributed to Section 10 the meaning set forth above, on the right-hand side of the page, the lower court proceeds to hold that this construction is necessary in order to reconcile it with Section 1, Part II., which is as follows:

"Sec. 1. Crimes and offenses, how prosecuted. That proceedings for the punishment and prevention of the crimes defined

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in Title I. of this Act shall be conducted in the manner herein provided"........32 - 38

It further holds that the phrase, "proceedings of the grand jury," shall be used as a modifying phrase only to that portion of Section 10 which refers to prosecutions under other laws of the United States. It then proceeds to the sweeping conclusion that by the Act of March 3, 1899, Congress intended to build up in Alaska a system of dual procedure ....37 - 38

a. Giving to Section 1, Part II., Act of May, 1899, its widest reasonable scope, namely, that the procedure provided therein only applies to the crimes defined in Title I., then the procedure for the punishment of other crimes than those defined in Title I. would be as it had been before the passage of the Act, and the indictment must be tested in accordance with the Oregon law in effect May 17, 1884, which prohibits the statement of more than one crime in one indictment..34 - 35

b. For the sake of argument, conceding the construction placed upon Section 10 by the lower court, the phrase, "proceedings of grand juries," refers only to the rules governing the conduct of its sessions as a deliberative body, and the scope of the phrase is not sufficient to justify the assumption of a dual system of court procedure. Citing 20 Cyc. 1293; Vol. 10. Ency. Pl. & Pr. 344; 24 Cent. Digest, Columns 2752-3 ....40 - 44

(That is to say, the lower court has reached an erroneous conclusion by confounding the words, "proceedings of grand jury," with the crim-

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inal procedure and giving to them the same scope.) 44

c. The Act of March 3, 1899, did not create a dual system of procedure, but simply consolidated the Oregon law and certain features of the Federal Statutes into one system of procedure .... 44 - 52

Section 10, upon the construction of which the opinion of the lower court turns, did not copy the laws of Oregon, for the reason that juries in Oregon, under the constitution and statutes, were drawn from counties, and no county government ever existed in Alaska, but the adoption of Section 10 did not change the pre-existing practice as laid down by Judge Deady in *Kie vs. U. S.*, 27 Fed. 351.

d. The enacting clause of the Act of 1899 shows an intention on the part of Congress to have the procedure laid down in that Act apply to all prosecutions of whatever nature. Section 1, Part II., of the Code should be controlled by it, but either the introductory words of Part I. or Part II. should be seriously considered so as to impair the plain meaning of the rest of the Act, for the reason they are really in the nature of preambles, having been tacked onto the Act after the deliverated work of codification had been completed. Citing Black on Interpretation of Laws, Sec. 77 .... 52 - 55

e. The theory adopted by the lower court in its opinion ignores the plain meaning of the words of Section 10, and there is nothing to support the ingenious, but revolutionary, theory that thereby a dual

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system of procedure was adopted in the District of Alaska 55

f. If this Court sustains the decision of the lower court, it is forced to reach the unnatural conclusion that by the Act of March 3, 1899, Congress intended to make Alaska an exception to the universal rule in the other territories, to the effect that the local procedure controlled whenever in conflict with the general laws relating to federal procedure......55 - 56

There is nothing in the statute to justify the assumption that the application of *Hornbuckle vs. Toombs* and *Fitzpatrick vs. U. S.* should not still apply to Alaska..............55 - 56

g. The opinion of the lower court completely ignores the basic rules of presumption against change in the law and against implied repeal. Citing *Jackson vs. U. S.* (District of Columbia), decided March, 1912; Black on Interpretation of Laws, Secs. 52-53 ....56 - 60

h. The decision of the lower court completely ignores the doctrine laid down by Senator Carter in the introduction to his Code, and by this Court in the case of *Tyee Co. vs. Jennings*, 137 Fed. 863, and that of Mr. Paul Charlton in his codification of 1906, to the effect that the new Alaska Codes of 1899 and 1900 are to be construed as simply a compilation, and that it was the intention of Congress to change the pre-existing law as little as possible. See introduction to Carter's Code, also Introduction to The Department Compilation, 1906 ....60 - 65

i. The doctrine of the lower court, that by virtue of Sections 1 and 10, Part II., Act

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of March, 1899, there should be read into the Alaska Criminal Procedure a dual system of procedure, and that Section 1024 was impliedly made a part of the Alaska law, violates the construction placed upon those sections by Senator Carter and Mr. Charlton in the annotations made by them at the time they completed their respective compilations. See annotation in Carter's Code, Part II., Sec. 10, also The Department Compilation, 1906 .... 65 - 68

7. If this Court affirms the opinion of the lower court with reference to joinder of crimes in the indictment, it must do so by adopting the restrictive construction placed upon Section 1, Part II., Act of 1899, and in such case the application devolves upon this Court to adopt a *like* restrictive construction with reference to the introductory words to Part I., and this Court will be compelled, therefore, to hold that Section 5209 was not a crime in the district after March 3, 1899 71

8. The government is not in a position to claim an affirmance of the judgment in this case, the defendant having been sentenced *without trial* in accordance with the provisions of the Alaska Code of Criminal Procedure, according to provisions of Section 97, Alaska Code of Criminal Procedure, for the reason that the only doctrine through which they can obtain an affirmance is the doctrine that federal procedure, and not local procedure, applies to the enforcement of Section 5209 in the District of Alaska.. 73

IN THE

United States Circuit Court Of Appeals

C. M. SUMMERS, *Plaintiff in Error,* vs. UNITED STATES OF AMERICA, *Defendant in Error.*	No. 2177

UPON WRIT OF ERROR FROM THE DISTRICT COURT OF THE DISTRICT OF ALASKA, DIVISION NUMBER ONE.

BRIEF OF DEFENDANT IN ERROR

STATEMENT OF CASE.

An indictment was returned against the plaintiff in error and filed in the District Court for the District of Alaska, Division No. One, on the 5th of

January, 1912, charging the defendant and one Stewart G. Holt with violations of Section 5209 of the Revised Statutes. This indictment contained fifty-six separate counts charging the defendants and each of them with fifty-six separate and distinct crimes. The first twenty-five counts charged the defendants with twenty-five distinct and separate crimes against Section 5209 of the Revised Statutes of the United States in making false entries in the books of the First National Bank of Juneau, Alaska. The transactions charged in the first twenty-five counts covered a period of two years. Counts 26 to 53, inclusive, charged separate and distinct offenses covering a period of about three years and related to alleged false entries in the reports to the Comptroller of the Currency. Counts 54, 55 and 56 charged separate and distinct misapplications and abstractions of funds from the First National Bank.

On the 8th day of January, 1912, the plaintiff in error interposed his demurrer to the said indictment demurring to the indictment as a whole and to each and every count of the indictment, among other grounds, upon the following grounds:

a. That the indictment did not conform to the provisions of Chapter 7, Title 2, of the Act of Congress, approved March 3, 1899, providing a Code of Civil Procedure for the District of Alaska and particularly to Section 43, Title 2, of said Act.

Section 43, Title 2, of said Act reads as follows (see Carter's Alaska Code, page 52):

Sec. 43. *"Indictments must charge but one crime and in one form.* That the indictment must charge but one crime, and in one form only; except that where the crime may be committed by the use of different means the indictment may allege the means and the alternative."

The foregoing section was adopted by the legislature of Oregon on the 19th day of October, 1864 (see Carter's Alaska Code, p. 52), and was adopted as one of the laws of Alaska on the 17th day of May, 1884 (see Carter's Code, p. 441, Sec. 7).

b. More than one crime was charged in the indictment.

c. That neither do the facts stated in the indictment nor in any count thereof constitute a crime.

d. That the grand jury by which said indictment was found had no legal authority to inquire into the crime charged, because the same is not triable within the district. (For copy of demurrer, see Tr., pp. 142-3.) This demurrer was overruled and the plaintiff in error allowed his exceptions. (See Tr., p. 143.) Plaintiff in the meantitme gave bail in the form and manner prescribed in the Alaska Code of Criminal Procedure. (See Tr., p. 140.)

The decision of the court upon some of the questions involved in the ruling upon this demurrer was afterwards reduced to writing in the form of an opinion by the court in the case of *The United States of America, plaintiff, vs. North Pacific Wharves and Trading Company et al., defendants.* We assume

that the United States attorney will print this opinion as a part of his brief, but a copy of the same is filed with the Clerk of this Court for reference in case it is not otherwise brought into the record.

Later and in the month of May, 1912, the plaintiff in error by permission of the court withdrew his plea of not guilty, which had been entered after the overruling of the demurrer, and renewed his demurrer to the indictment (see Tr., p. 163), and after consideration the court again overruled the demurrer of the plaintiff in error and allowed the plaintiff in error his exceptions. (Tr., pp. 163-4.) Thereupon the defendant elected under Section 97 of the Alaska Code of Criminal Procedure to stand upon his demurrer and declined to plead further. (Tr., pp. 181-2.) Pursuant to Section 97 the court thereupon, without trial, entered a judgment finding the defendant guilty of each and every one of the fifty-six separate crimes charged in the indictment and sentenced the defendant to five years' imprisonment under each and every one of the counts in the indictment, and provided that service of the sentence under each and every one of the counts might be concurrent. (Tr., pp. 182-5.)

Upon re-argument of the demurrer the record in this case was made so as to clearly and succinctly present to this Court under a short record the vital questions involved in this case, which are as follows:

1. Is Section 1024 of the Revised Statutes of the United States, permitting joinder of separate

offenses, applicable to the District of Alaska, or does the Act of October 19, 1864, of the laws of Oregon, adopted May 17, 1884, as the law of Alaska and now embodied in Section 43 of the Alaska Criminal Code of Procedure, prohibiting the joinder of offenses, control?

2. Is Section 5209 of the Revised Statutes in effect in Alaska, and is a violation of that section a crime committed when within the District of Alaska or has a grand jury in the District of Alaska legal authority to inquire into such a charge?

3. Upon the record in this case, can the judgment of the lower court be sustained?

After the entry of the judgment due proceedings were had and plaintiff in error sued out his writ to this Court and bail bond was given upon appeal in the manner and form required by the Alaska Code of Criminal Procedure. (See Tr., p. 185; Carter's Code of Alaska, Chap. 22, pp. 79-83.) In fact, all of the proceedings disclosed by this record were in strict conformity with the Alaska Criminal Code of Procedure except the indictment, which is drawn in accordance with the practice in the United States Circuit and District Courts.

SPECIFICATION OF ERRORS.

I.

The court erred in overruling the demurrer of the defendant to the effect that the indictment did

not substantially conform to the requirements of Chapter 7, Title 2, of the Alaska Code, and partticularly to Section 43 of said chapter, and also in overruling the third ground of demurrer that more than one crime was charged in the indictment. (See Tr., pp. 189-190.)

II.

The court erred in overruling the demurrer of the plaintiff in error to each and every one of the counts in said indictment in that they did not, nor did any of them, state a crime. (Tr., pp. 189-190.)

III.

The court erred in giving and entering judgment against the defendant upon the record herein. (Tr., pp. 189-190.)

BRIEF AND ARGUMENT

FIRST SPECIFICATION OF ERROR.

The first specification of error distinctly raises the following question: Does Section 1024 of the Revised Statutes permitting joinder of separate offenses apply to the proceedings of a District Court for the District of Alaska, or does the provision prohibiting joinder of offenses adopted from the laws of Oregon, May 17, 1884, and found in the Criminal Code of Procedure of Alaska, Section 43, control?

This discussion may be divided into several propositions. Our first proposition is as follows:

First: SECTION 1024, REVISED STATUTES, WAS NEVER INTENDED TO APPLY TO TERRITORIAL COURTS, BUT WAS INTENDED TO APPLY ONLY TO UNITED STATES CIRCUIT AND DISTRICT COURTS.

Section 1024 of the Revised Statutes of the United States reads as follows:

> "Sec. 1024: When there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses, which may be properly joined, instead of having several indictments the whole may be joined in one indictment in separate counts; and if two or more indictments are found in such cases the court may order them to be consolidated."

This section is in direct conflict with the specific legislation relating to procedure in Alaska, which is as follows:

> "*Indictment must charge but one crime and in one form.* That the indictment must charge but one crime, and in one form only; except that where the crime may be committed by the use of different means the indictment may allege the means and the alternative."

See laws of Oregon, Act October 19, 1864; Sec. 7, U. S. Act of May 17, 1884; Carter's Alaska Code, p. 441; Sec. 43, Part 2, Carter's Alaska Code, p. 52.

Section 1024 of the Revised Statutes of the United States first became a law of the United States through the enactment of Chapter 80 of the U. S.

Statutes at Large of 1853 (Act of February 26); (See Vol. 10, U. S. Stat. at Large, pp. 161 and 169). The Act is entitled as follows:

> "An Act to regulate the fees and costs to be allowed clerks, marshals and attorneys of *the circuit and district courts of the United States*, and for other purposes."

The enacting clause is as follows:

> "Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, that in lieu of compensation now allowed by law to attorneys, solicitors and proctors in *the United States Courts*, United States district attorneys, clerks of the *district* and *circuit courts*, marshals, witnesses, jurors, commissioners and printers in the *several states*, the following and no other compensation shall be taxed and allowed."

Section 1 of the Act provides schedule of fees for United States attorneys, clerks and marshals, and also contains the exact language of Section 1024 of the Revised Statutes. The Act has to do with the accounting of various officers for their fees and expenses and with schedules of fees of commissioners and witnesses.

The provisions of the Act show without question, not only from the title but from the body, that it has no general application except to constitutional courts, and would have no application unless specially extended to any of the territorial courts.

(a) *The District Court of Alaska is not a Circuit or District Court of the United States.*

The Supreme Court of the United States in the case of

McAllister vs. United States, 141 U. S. 174,

held (shortly after civil government was extended to Alaska) that the District Court for the District of Alaska was not a court of the United States. Following this decision, some ten years later this court certified to the Supreme Court of the United States, in the case of

The Coquitlam, 168 U. S. 346,

the question as to whether the District Court for the District of Alaska, when exercising its criminal admiralty jurisdiction, was a District Court of the United States within the meaning of the Act allowing appeals to the Circuit Court of Appeals, and the Supreme Court of the United States held that it was not, but treated the District Court of Alaska purely and simply as a territorial court, even when exercising its admiralty jurisdiction. In this connection the court uses the following language:

> "The district and circuit courts mentioned in the act of 1891, and whose final judgment may be reviewed by the circuit courts of appeal, manifestly belong to the class of courts for which provision is made in the third article of the Constitution, namely: constitutional courts, in which the judicial power conferred by the Constitution on the general government can be deposited, and the judges of which are entitled,

by the Constitution, to receive at stated times a compensation for their services that cannot be diminished during their continuance in office, are removable from office only by impeachment, and hold, beyond the power of Congress to provide otherwise, during good behavior. *American Ins. Co. vs. 356 Bales of Cotton*, 26 U. S. 1 Pet. 511, 546 (7:242, 256); *Benner v. Porter*, 50 U. S. 9 How. 235, 242 (13:119, 122); *Clinton v. Englebrecht*, 80 U. S. 13 Wall. 434, 447 (20:659, 663); *Hornbuckle v. Toombs*, 85 U. S. 18. Wall. 648, 655 (21:966, 968); *Good v. Martin*, 95 U. S. 90, 98 (24:341, 344); *Reynolds v. United States*, 98 U. S. 145, 154 (25:244, 246); *The City of Panama v. Phelps*, 101 U. S. 453, 465 (25:1061, 1065). And it was adjudged in *McAllister v. United States*, 141 U. S. 174, 181 (35:693, 695), that the district court established in Alaska, although invested with the civil and criminal jurisdiction of a district court of the United States, was a legislative court, created 'in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations respecting the territory belonging to the United States.' It was because the Alaska court was of the latter class that we held in *McAllister v. United States*, 141 U. S. 174 (35:693), that the judge of the district court of that territory could be suspended from office by the President under the authority conferred by U. S. Rev. Stat. Sec. 1768.

It necessarily results that the circuit court of appeals for the ninth circuit cannot review the final judgments or decrees of the Alaska court in virtue of its appellate jurisdiction over the district and circuit courts mentioned in the act of March 3, 1891."

We lay special stress upon the distinction above

referred to, for the reason that throughout the opinion of the lower court it is apparent that the lower court labors under the impression that although it is a territorial court, nevertheless when it exercises a jurisdiction *similar* to the jurisdiction of a district or Circuit Court of the United States it then becomes *ipso facto* a District or Circuit Court of the United States and is, therefore, controlled by the statutes governing its practice and procedure. In other words, that the dignity and character of the court is raised from that of a territorial court immediately when the court commences to exercise jurisdiction over the same subject matter as in the states comes within the cognizance of Circuit and District Courts of the United States. This was the misapprehension under which Judge McAllister labored. As a matter of reason, however, there is no more warrant in a territorial court calling itself for any purpose "A court of the United States," "A District Court of the United States," or "A Circuit Court of the United States," when it is exercising jurisdiction over these matters than there would be for one of the English courts to call itself a District Court of the United States when exercising its jurisdiction in admiralty. The identity of the subject matter of the jurisdiction certainly can have no effect upon the character of the court under the circumstances. We submit, therefore, that a reading of the Act of Congress of 1857, from which Section 1024 is taken, shows conclusively that the Act was intended to apply only to District and Circuit Courts

of the United States, and this being the case, the Act is inapplicable, as held in the cases above cited, and has distinctly been held by this court in the case of

Corbus vs. Leonhardt, 114 Fed. 10.

In that case the court uses the following language:

> "Hawley, District Judge (after stating the facts as above). 1. The objections presented by the first assignment of error are based upon the ground that the testimony of Dr. Leonhardt comes within the provisions of Section 858, Rev. St., and that by this section he was not a competent witness to any transactions and conversations between himself and defendant's intestate. We are of opinion that the court did not err in admitting the testimony objected to. It is, perhaps, true, as claimed by the plaintiff in error, that there is no decision directly in point, but the decisions bearing upon the general question lead us to the conclusion that Section 858 does not apply to territorial courts. *Good v. Martin*, 95 U. S. 90, 98, 24 L. Ed. 341; *McAllister v. U. S.*, 141 U. S. 174, 11 Sup. Ct. 949, 45 L. Ed. 693; *Thiede v. Utah*, 159 U. S. 510, 515, 16 Sup. Ct. 62, 40 L. Ed. 237; *The Coquitlam v. U. S.*, 163 U. S. 346, 351, 16 Sup. Ct. 1117, 41 L. Ed. 184; *Jackson v. U. S.*, 42 C. C. A. 452, 102 Fed. 473, 479.
>
> In *Good v. Martin, supra*, the court said: 'Territorial courts are not courts of the United States, within the meaning of the constitution, as appears by all the authorities. *Clinton vs. Englebrect*, 13 Wall. 434, 20 L. Ed. 659; *Hornbuckle v. Toombs*, 18 Wall. 648, 21 L. Ed. 966. A witness in civil cases cannot be excluded in the courts of the United States because he or she is a party to or interested in the issue tried, but the provision has no application in the

courts of a territory where a different rule prevails.'

Page v. Burnstine, 102 U. S. 664, 26 L. Ed. 268, cited by the plaintiff in error, is not in opposition to these views. That decision was rendered under certain provisions of the act providing a government for the District of Columbia, which are not applicable to Alaska. In the course of the opinion the court said:

'These views do not at all conflict with the previous decisions of this court, holding that certain provisions of the General Statutes of the United States relating to the practice and proceedings in the "courts of the United States" are locally inapplicable to territorial courts.'

By provision of Section 3 of the 'Act providing a civil government for Alaska,' approved May 17, 1884 (23 Stat. 24), there was 'established a district court for said district, with the civil and criminal jurisdiction of District Courts of the United States.' By Section 7 of this act it was provided 'that the general laws of the state of Oregon now in force are hereby declared to be the law in said district, so far as the same may be applicable and not in conflict with the provisions of this act or the laws of the United States.' At the time this law was enacted there were no restrictions excluding witnesses from testifying in any case. 1 Hill's Ann. Laws Or., Sec. 710. These laws were in force in Alaska at the time this suit was brought and at the time of Robert Duncan's death, and were applicable to the proceedings had in this case."

To the same effect see *U. S. vs. Ball*, 147 Fed. 32 (C. C. A. 9th Circuit).

No attempt is made in the opinion of the lower court to reconcile its ruling with the case of *Corbus*

vs. Leonhardt or any of the other cases above cited, nor is any discussion given whatever to the ruling of this Court in the case of *Corbus vs. Leonhardt.* There certainly can be no question but that the District Court of the District of Alaska is yet a territorial court, for the latest rulings hold Alaska to be a territory. See

Interstate Commerce Commission vs. U. S., Oct. term, 1911;

Lawyer's Co-Op. Adv. Sheets, p. 556;

Nagel vs. U. S., 191 Fed. 141.

(b) *Legislation subsequent to the Act of February 26, 1853 (which first introduced Section 1024 into the Federal Statutes) shows that it has never applied to the territories except where specifically extended thereto.*

No territory of the United States is mentioned in the Act except the territory of Oregon. The Act contains the following proviso:

> "Provided that in the state of California and the territory of Oregon officers, jurors and witnesses shall be allowed for the term of two years double the fees and compensation allowed by this Act, and the same fees allowed with this Act with fifty per cent. added thereto for two years thereafter."

It will be seen, therefore, that the general provisions of the Act were not extended to the territory of Oregon, and only that portion of it which related to the schedule of fees had any relation to the terri-

tory of Oregon, and by the terms of the Act only related to the territory for the period of four years after the passage of the Act. It was soon discovered that the Act did not extend to the territories, and the provisions of the Act, in so far as they relate to fees and compensation, were extended to three territories by Chapter 175 of the Statutes at Large (See Vol. 10, p. 671). The territories over which the operation of the Act was extended were the territories of Minnesota, New Mexico and Utah. The extension of this Act over these particular territories is discussed by the Supreme Court of the United States in the case of

United States vs. Averill, 130 U. S., p. 335.

Subsequently, on the 7th of August, 1882, Congress extended the Act of February 26, 1853, to the territories of New Mexico and Arizona (New Mexico having been in the meantime subdivided) in so far as the Act related to fees and compensation. (See 22 Stat. at Large, p. 344.)

In 1883 the compensation of the clerk of the Supreme Court of the District of Columbia was made the same by special enactment. (22 Stat. at Large, p. 344.)

When the first organic Act was passed for Alaska (the Act of May 17, 1884), the Act of February 26, 1853, was not extended to the District of Alaska, the following provision being the provision adopted:

"Sec. 9. The governor, attorney, judge, marshal, clerk and commissioner * * * they

> shall severally receive the fees of office established by law for the several offices, the duties of which have hereby been conferred upon them as the same are determined and allowed in respect to similar officers under the laws of the United States, which fees shall be reported to the attorney general and paid into the treasury of the United States."

It must necessarily be assumed, therefore, that Section 1024 was never intended by Congress to apply except to the practice in District and Circuit Courts of the United States.

(c) *Provisions prohibiting the joinder of more than one offense in an indictment, long prior to March 22, 1882, had been adopted by all of the western states and territories, when the Edmonds Act was passed, and the provisions of that Act conclusively show that Congress realized that Section 1024 did not apply to the territories.*

Section 43 of the present Code of Criminal Procedure for the District of Alaska was first enacted in Oregon on the 19th day of October, 1864. (See Carter's Code, p. 52, footnote to Section 43.) Similar provisions were adopted as follows: Montana, prior to 1873 (see Sections 184 and 188, Laws of Montana, 1871 to 1872); Arizona, prior to 1872 (see Section 217, Laws of Arizona, 1864 to 1871); California, prior to 1853, Laws of California, 1850 to 1853, Section 241; Nevada, prior to 1874 (see Section 1862 (238) compiled Laws of Nevada, Vol 1, 1861 to 1873); Utah, 1878, Section 153, Laws of Utah, 1878; Washington (see Vol. 2 of Hill's Code,

page 479, Section 1238); and Idaho prior to 1875, Sec. 237, Laws of Idaho, 1874-5. So that, prior to the passage of the Edmonds Act in 1882, and prior to the passage of the first act providing for civil government in the District of Alaska, May 17, 1884, it must be presumed that Congress knew that in none of the western states or territories could more than one crime be stated in an indictment.

(d) *The Edmonds Act.*

On March 22, 1882, the Edmonds Act was passed, providing for the punishment of polygamy and kindred offenses in the territories and other places under the jurisdiction of the United States. By Section 4 of that Act (see Statutes at Large, Vol 22, p. 31) we find that Congress has made special provision for the joinder of separate offenses of polygamy and kindred social crimes.

If Section 1024 applied to the territories in cases of prosecution for offenses against the statutes of the United States as distinguished from territorial acts, why, then, was it necessary for Congress to specially permit the joinder of such offenses in the territory?

Since the enactment of the Alaska Code Congress has adopted an Act known as the "Crimes Act," and under the chapter entitled "Certain Offenses in the Territories," it has provided for the joinder of certain offenses therein named, not including the offenses charged in the indictment at bar.

Under Act of Congress, March 4, 1909, Chapter 13, entitled, "Certain Offenses in the Territories," the provisions of the Edmonds Acts are substantially re-enacted.

If Section 1024 was in effect in the territories, why was it necessary for Congress to again give special permission for the joinder of particular offenses?

Second: UNDER THE ACT OF MAY 17, 1884, PROVIDING A CIVIL GOVERNMENT FOR ALASKA, THERE IS NO QUESTION BUT THAT THE OREGON LAW WAS ADOPTED, AND THAT ONLY ONE CRIME COULD BE STATED IN AN INDICTMENT.

In order to secure a correct understanding of the meaning of the Alaska legislation, it is necessary to follow chronologically the history of the legislation with reference to Alaska and with reference to its administration. The treaty with Russia was ratified on the 20th day of June, 1867. (See introduction to Carter's Alaska Code, pages XVII. to XIX.) On Friday, October 18, 1867, General Rosseau raised the American flag at Sitka and the Russian flag was lowered, and the United States took formal possession of Alaska.

After the proclamation of the treaty of purchase, no legislation was had concerning Alaska until the provisions relating to the unorganized territory of Alaska Act of March 5, 1872, were passed. These provisions are to be found in the Revised Statutes,

Sections 1954 to 1976. The customs laws were extended to the district and authority given to the secretary of the treasury to lease the Seal Islands by this Act, and jurisdiction was conferred on the courts of the United States for California, Oregon and Washington. (See introduction to Carter's Alaska Code.) Practically all violations of the laws that were prosecuted at all were prosecuted before Judge Deady, Federal Judge at Portland, as will be seen from an examination of the early cases found in the Federal Reporter. On the 17th of May, 1884, the first act providing civil government for Alaska was approved. This Act provided for a governor, the organization of a district court, a judge of that court, a district attorney, marshal and clerk, four commissioners. "Such commissioners shall exercise all the duties and powers, civil and criminal, now conferred on justices of the peace under the general laws of the state of Oregon." (See Sec. 5, Carter's Alaska Code, p. 440.)

Section 7 of this Act provided:

> "That the general laws of the state of Oregon now in force are hereby declared to be the law in said district so far as the same may be applicable and not in conflict with the provisions of this Act or the laws of the United States."

(See Carter's Code, p. 441.)

It is not surprising, under the circumstances above stated, that Congress saw fit to adopt Judge Deady's Code of 1881, together with such modifications as may have been enacted between that date and May

17, 1884, as the law of Alaska; nor is the action of Congress in adopting the laws of another state as the laws of a territory without precedent, as this was done with reference to legislation of Indian Territory, where the laws of Arkansas were adopted. See

Belt & Gulf Ry. Co., 22 Southwestern 1063;

P. Ardmore Coal Co. vs. Bevelle, 61 Fed. 757;

Ex parte Fuller, 182 U. S. 562.

In the territory of Oklahoma the legislation of the state of Nebraska was adopted. See

U. S. vs. Choctaw & O. G. Ry. Co., 41 Pac. 729, at p. 746.

In deciding the question in issue in this case, the lower court, in attempting to show that the rule adopted in the case of

Clinton vs. Englebrecht, 80 U. S. 444,

has no application to Alaska, in its opinion contends that Alaska is in a different situation from the territories to which a legislature had been given, and uses the following language:

"It will also be observed that all the organic acts creating the territories and empowering them to elect local legislatures to legislate for said territories, contain substantially the same provision, that conferring legislative authority on the territory of Utah, which is quoted in *Clinton v. Englebrecht*, 80 U. S., on page 444, as follows:

'The legislative power of said territory shall extend to all rightful subjects of legislation,

consistent with the Constitution of the United States and the provisions of this Act.'

It is apparent from such legislation that Congress intended that the legislatures of the various territories should be vested with full power to legislate, not only concerning legal procedure, both criminal and civil, but also to enact any substantive legislation not inconsistent with the Constitution of the United States and the acts of Congress creating such territories. The Supreme Court of the United States, in the cases of *Clinton v. Englebrecht* and *Hornbuckle v. Toombs, supra*, holds that the power granted to the legislatures to legislate for the territories, and the approval of their legislation by Congress indicates that it was the intention of Congress to lodge in the local legislatures of the territories power to legislate when not in conflict with the Constitution of the United States or the organic acts of such territories. It must, therefore, be conceded to be the settled law that in a territory where a legislature has been provided for by act of Congress such legislature has the power to provide for the procedure to govern the trial of all causes, without reference to whether or not the same are being conducted under the local laws of the territory or under the general laws of the United States. The Alaska cases cited by counsel which have been passed on by our Appellate Court deal with questions of procedure in the prosecution of violations of the local law. It must be admitted that Alaska is an organized territory within the meaning of Section 1891 of the revised statutes of the United States, which provides:

'The Constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within all the organized territories, and in every territory hereafter organized, as elsewhere within the

> United States.' *Nagle v. United States*, 191 Fed. 141. But does it follow, because Congress has seen fit to grant to the legislatures of the territories where legislative assemblies are provided, to enact a complete set of laws governing procedure in all cases, that it did not intend to extend to Alaska any of the general laws of the United States providing for the procedure in federal courts?"

The foregoing shows that the lower court in rendering its opinion gave no consideration whatever to the decision of the Supreme Court of the United States in the case of

United States vs. Pridgeon, 153 U. S. 48.

In discussing the adoption of the laws of Nebraska upon the organization of the territory of Oklahoma, the court uses the following language:

> "It was intended by Congress that the laws of Nebraska should constitute a territorial code as distinguished from the laws of the United States in force in the territory of Oklahoma, and that they should sustain the same relations to the courts and to the people of the territory and to the legislative assembly as a code of laws enacted by the legislative assembly."

We claim that it is very apparent that Congress had no intention whatever of discriminating between the code of laws theretofore enacted by the territory and state of Oregon and any code of laws which might have been enacted by a legislative assembly of the District of Alaska, had such assembly been created.

Third: THE LEADING CASES.

In order to understand the meaning and application of the Act of 1884, let us refer for a moment to the situation with reference to the construction that courts had placed upon the powers and duties and practice of a territorial court prior to the adoption of the laws of Oregon by the Organic Act of 1884.

On the 15th of April, 1872, the Supreme Court of the United States rendered its decision in the case of

Clinton vs. Englebrecht, 80 U. S. 434,

wherein it held that the courts of a territory are not courts of the United States, and wherein it held that the law of a territorial legislature prescribing the mode of obtaining panels for grand and pettit jurors is obligatory upon the district courts of the territory.

On May 4, 1874, after serious and due consideration, the Supreme Court of the United States in the case of

Hornbuckle vs. Toombs, 85 U. S., 648,

reversed all of its previous decisions to the contrary and definitely decided with reference to matters of procedure in a territory that the courts of the territories were to be guided by the law of procedure as established by its local legislation.

On October 22, 1877, the Supreme Court of the United States decided the case of

Good vs. Martin, 95 U. S., 90,

and the court there held that territorial courts were

not courts of the United States and that that section of the laws of the United States which provide that a witness in civil cases cannot be excluded in courts of the United States because he or she is a party to or interested in the issue tried has no application to the courts of a territory.

On May 5, 1879, the Supreme Court of the United States decided the case of

Reynolds vs. United States, 98 U. S., 145,

(criminal case), which case was decided after an original argument and two rehearings and the court there held that the territorial practice and not the federal practice controls in prosecutions for bigamy under Section 5352 of the Revised Statutes and follow the decisions above cited. It is no wonder, therefore, that when the Edmonds Act was passed in 1882 it was deemed necessary to specially authorize the joinder of offenses of this character in one indictment, for these decisions conclusively established a doctrine which would prevent the application of Section 1024 to the territories. This matter has been discussed in a previous portion of the brief.

On April 4, 1881, the Supreme Court decided the case of

Miles vs. United States, 103 U. S., 304,

where it was held that upon a prosecution for bigamy a territorial court must follow the territorial practice in impaneling its jury.

There can be no question then but that Congress,

in adopting the laws of Oregon as the laws of the territory of Alaska, gave to those laws the same force and effect as if they had been specifically adopted for the territory of Alaska by a territorial legislature with the sanction and consent of Congress. There can be no doubt that there was in the minds of Congress no distinction between the force and effect of the local laws so adopted for the territory of Alaska and the local laws of any other territory, nor can there be any doubt that into the construction and interpretation of those laws it was intended and fully known would be read the doctrine announced in the leading cases just above cited.

Subsequent to the passage of the Act of 1884 the doctrine of *Hornbuckle vs. Toombs* and the other cases above cited has not been departed from. On November 11, 1885, the case of *Thiede vs. Utah*, 159 U. S., p. 510, was decided and it was there held that the provisions of Section 1033, U. S. Revised Statutes, requiring that defendant have a list of the Government witnesses to be sworn before trial applied only to United States Courts and did not control the courts of Utah territory. It is to be noted that the section of the Revised Statutes above referred to is not limited by its terms to courts of the United States.

Subsequently in the case of

Welty vs. United States, 76 Pacific, 121,

a full and complete discussion of all of the authorities was had by the Supreme Court of the terri-

tory of Oklahoma and the doctrine reaffirmed that local procedure governs in prosecutions in the territorial courts.

To the same effect is a decision of the Federal District Court in the case of

United States vs. Haskell, 169 Fed., 449.

On the 30th of July, 1906, a complete and exhaustive opinion upon the same subject was rendered by the Circuit Court of Appeals for the Eighth Circuit, speaking through Van Devanter, Circuit Judge (now Mr. Justice Van Devanter) in the case of

Cochran vs. U. S., 147 Fed., 206.

The disposition throughout the entire opinion of the lower court in the case at bar to hold that there is a distinction between the practice where the territorial court is sitting in judgment upon a local crime and sitting in judgment upon an offense against the laws of the United States is effectively disposed of by Judge Van Devanter. The court uses the following language:

> "It is important, therefore, to inquire whether the territorial district court, when exercising the jurisdiction of the Circuit and District Courts of the United States in the trial of an offense against the laws of the United States, should conform to the practice and modes of proceding in the Circuit and District Courts of the United States or to those prescribed by the territorial statutes. The question is not new, and the answer to it is found in repeated de-

cisions of the Supreme Court of the United States. *Reynolds vs. United States*, 98 U. S. 145, 25 L. Ed. 244; *Miles vs. United States*, 103 U. S. 304, 310, 26 L. Ed. 481; *Clinton vs. Englebrecht*, 13 Wall. 434, 447, 20 L. Ed. 659; *Hornbuckle vs. Toombs*, 18 Wall. 648, 21 L. Ed. 966; *Good vs. Martin*, 95 U. S. 90, 98, 24 L. Ed. 341. These decisions hold that the territorial courts, although expressly clothed with the same jurisdiction in all cases arising under the Constitution and laws of the United States as is vested in the Circuit and District Courts of the United States, are not courts of the United States, but legislative courts of the territories; that the practice and modes of proceeding, including that of impaneling juries, prescribed for the courts of the United States, have no application to them, and that they are bound to conform to the territorial laws upon these subjects where it is not otherwise specifically provided by some law of the United States."

Fourth: SUBSEQUENT DECISIONS OF THE VARIOUS COURTS ARE UNIFORM TO THE EFFECT THAT THE CRIMINAL PROCEDURE ESTABLISHED BY THE LAWS OF OREGON CONTROL IN THE DISTRICT OF ALASKA.

In May, 1891, the case of *United States vs. Clark*, 46 Federal, p. 633, was decided by Judge Bugby, one of the early judges of the District Court. It was there held that the crime of murder under Section 5339 of the Revised Statutes punishing the crime within the maritime and territorial jurisdiction of the United States wherever the same is committed in any fort, arsenal, dockyard, magazine or any other place, district or country under the exclusive jurisdiction of the United States, should be

punished under that section and not under the section of the Oregon law punishing the crime of murder, for the reason that the section of the Revised Statutes above cited had special application to the territory. The court then proceeds:

> "This court, under the authority of the organic act, must follow the course of *procedure in all cases*, civil and *criminal*, laid down in the general laws of Oregon in force May 17, 1884, so far as the same may be applicable and not in conflict with the provisions of the organic act or the laws of the United States which have been extended to the territory."

On the 14th of May, 1900, the Circuit Court of Appeals (this court) decided the case of

Jackson vs. United States, 102 Federal, p. 473,

and held that the Oregon statutes with reference to criminal practice were to be regarded as the rule of procedure in the District of Alaska.

On the 3rd of February, 1902, this court decided the case of

Corbus vs. Leonhardt, 114 Fed., 10,

previously quoted in this brief, which must be considered decisive of the general proposition involved in this case.

On the 28th of May, 1900, the question involved in this case, we take it, was settled for all time by the Supreme Court of the United States in the case of

Fitzpatrick vs. United States, 178 U. S., 304.

This was a prosecution for murder under Section 5339 of the Revised Statutes. Mr. Justice Brown, in deciding the case, used the following language:

> "By section 7 of an Act providing a civil government for Alaska, approved May 17, 1884, it is enacted 'that the general laws of the state of Oregon now in force are hereby declared to be the law in said district, so far as the same may be applicable, and not in conflict with the provisions of this Act or the laws of the United States'. We are therefore to look to the laws of Oregon and the interpretation put thereon by the highest court of that state, as they stood on the day this act was passed, for the requisites for an indictment for murder, rather than to the rules of the common law."

The court then proceeds to test the indictment by Section 1268, Hill's Annotated Laws of Oregon, and by Section 1270. These same sections are now a part of the Alaska Code of Criminal Procedure, being Sections 38 and 40 of Chapter 7, Part II. (See Carter's Code, pp. 51 and 52.)

They are a part of the same act and chapter which originally became the law of Oregon in 1864 and which act and chapter then and now contain the provision prohibiting the statement of more than one crime in the indictment.

Fifth: SINCE THE ADOPTION OF THE NEW ALASKA CODE, 1899-1900, THIS COURT HAS FOLLOWED THE RULE HERETOFORE LAID DOWN IN CONSTRUING THE ACT OF MAY 17, 1884.

In the case of

United States vs. Ball, 147 Fed., 32,

at page 36 (June, 1906), this court, speaking through Judge Gilbert, used the following language:

> "It is assigned as error that the court overruled the motion of the plaintiff in error to require the district attorney to furnish him a list of all the witnesses to be produced against him on the trial in accordance with the provisions of section 1033 of the Revised Statutes. (U. S. Comp. St. 1901, p. 722.) That statute applies only to the trial of treason and capital cases in the courts of the United States. The present case was tried in a territorial court under the Penal Code and Code of Criminal Procedure of Alaska. Those codes contain no requirement that a list of witnesses be furnished the accused upon demand or otherwise. In *Thiede vs. Utah Territory*, 159 U. S. 510-515, 16 Sup. Ct. 62, 40 L. Ed. 237, it was held that section 1033 does not control practice and procedure in territorial courts. The court said:
>
> "'In the absence of some statutory provision, there is no irregularity in calling a witness whose name does not appear on the back of the indictment or has not been furnished to the defendant before the trial.'"

Sixth: THE PROPER INTERPRETATION OF THE ALASKA CODE.

The inrush of gold seekers to Dawson in 1897 and to Nome in 1898 and 1899 caused the popula-

tion of Alaska to greatly increase and new legislation became necessary. This legislation was referred to committees and placed in the charge of Hon. Thomas H. Carter, senator from Montana. By the month of March, 1899, the first two parts of this code were completed and enacted. (See Act of March 3, 1899, p. 429, entitled "An Act to define and punish crimes in the District of Alaska and to provide a code of Criminal Procedure for said District.") Carter's Code, page 1, *et seq.*, Parts III., IV and V of the Alaska Code were perfected and became law under the Act of June 6, 1900, entitled "An Act making *further* provision for a civil government for Alaska, and for other purposes," but as we shall see later, these Acts are considered as two installments of one general scheme of codification.

The provisions of these Acts which are material to the questions passed on by the lower court in this case are as follows:

1. The title to the Act of March 3, 1899 (just recited).

2. The enacting clause, which is as follows:

> "Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, that the penal and criminal laws of the United States of America and the procedure thereunder relating to the District of Alaska shall be as follows:"

In examining these two provisions there is no difficulty in ascertaining that in passing the Act it was the intention that the criminal procedure laid down in the Act should be followed in all prosecutions for crime in the District of Alaska.

The only difficulty arising in the construction of the Act is due to the crude and unworkmanlike introduction to Part II of the Act, Section 1 of which is in the following words:

> "Sec. 1. Crimes and offenses, how prosecuted. That proceedings for the punishment and prevention of the crimes *defined in Title I of this Act* shall be conducted in the manner herein provided."

(*a*) If it were not for this one section no claim could be made that the Act was obscure in any part in so far as it relates to the question in issue in this case. It is to be noted, however, that no provision is made for any other and different method of procedure in relation to crimes *not defined in Title I.* Of course the crime charged in this case is an offense against the Revised Statutes of the United States and is not defined in Title I. If, however, Part II does not provide the rule of procedure in crimes not defined in Title I, what procedure does apply? It must still be the law as adopted by the Act of May 17, 1884, and as construed by the decision of the Supreme Court of the United States in *Fitzpatrick vs. United States* and other cases,

supra, because Section 1 does not repeal the theretofore legally authorized practice applicable to prosecutions for violations against offenses, which practice was fully defined in the case of *Fitzpatrick vs. United States.* Therefore in effect there would be no difference, so far as the rights of this defendant are concerned, because Section 43 of this Criminal Code of Procedure was a part of the Oregon law applicable to the District of Alaska prior to the adoption of this code.

Chapter 2 of the Code of Criminal Procedure adopts the Federal Statutes of Limitation for the prosecution of crime and is in the following language:

> "Sec. 6. That criminal action must be commenced within the periods prescribed in the laws of the United States now in force or that may hereafter be enacted."

Upon the publication of this code Senator Carter set out in his foot notes the exact portion of the Revised Statutes of the United States thereby read into the code. (See Carter's Code, p. 45.)

A second compilation of the laws of Alaska was promulgated under the supervision of the Secretary of War by the Bureau of Insular Affairs on the 10th of January, 1906, this codification being prepared under the direction of Paul Charlton, law officer of the Bureau of Insular Affairs, by Fred F. Barker, and is known as Senate Document No. 142

of the Fifty-ninth Congress, First Session. In the marginal annotation given in this compilation the precise sections of the Revised Statutes to be read into the code by reason of Section 6 are cited (being Sections 1043 and 1044), (See section 6 and the annotations of Senator Carter and Mr. Charlton). Section 6 has some bearing upon the case at bar, but is here referred to mainly to show the method adopted by Senator Carter and Mr. Charlton in giving to the public at the time the revisions were made citations to those portions of the Revised Statutes which should be read into the Act. If it was intended by Act of 1899 to establish a dual system of procedure, why did not Congress provide so that crimes in Title I should be limited by Oregon Statutes and other crimes by the laws of the United States?

Chap. 4 of the Alaska Code, Section 10, provides as follows:

> "Sec. 10. Grand jury, how selected and summoned. That grand juries, to inquire of the crimes designated in title one of this Act, committed or triable within said District, shall be selected and summoned, and their proceedings shall be conducted, in the manner prescribed by the laws of the United States with respect to grand juries of the United States district and circuit courts, the true intent and meaning of this section being that but one grand jury shall be summoned in each division of the court to inquire into all offenses committed or triable within said District, as well as those that are

> designated in title one of this Act as those that are defined in other laws of the United States."

(See Carter's Code, p. 46.)

It is upon the interpretation and construction of this section that the lower court held that the entire law, as previously understood in Alaska, was changed, and that the general rule that local procedure should control the territorial courts was abolished and Alaska made an exception to the general rule that in the prosecution of federal offenses the federal procedure should be followed. It is said by the court below in effect that owing to the peculiar wording of Section 1, Part II, of the Alaska Criminal Code the rest of the Act must necessarily be construed so as to reconcile the rest of the Act with Section 1. An examination of the opinion of the lower court will show that there is no actual or even apparent conflict in the reading of any of the sections except when Section 1 of Part II is brought into consideration. The court holds specifically that in view of Section 1, Section 10 must not be given its ordinary and apparent meaning, but in order to reconcile it with Section 2 the court uses the following language:

> "While its language is confusing and contradicts Section 1, as well as other provisions of the code of criminal procedure, when carefully considered in the light of the dual powers of the court as well as the other sections of the code of criminal procedure, it is reasonably clear that Congress intended by Section 10 to

provide for two methods of procedure: one to govern the trial of offenses against the general laws of the United States and the other to govern the proceedings in the prosecution of local or territorial crimes defined in Title I of the Act to define and punish crimes in the District of Alaska and to provide a code of criminal procedure in said district. Section 10, therefore, should receive the construction which would be warranted if it contained the following language:

" 'That the grand juries, to inquire of the crimes designated in Title I of this Act, committed or triable within said District, shall be selected and summoned in the manner prescribed by the laws of the United States with respect to grand juries of the United States district and circuit courts; and grand juries, to inquire of crimes defined in other laws of the United States, committed or triable within said District, shall be selected and summoned and their proceedings shall be conducted in the manner prescribed by the laws of the United States with respect to grand juries of the United States district and circuit courts; the true intent and meaning of this section being that but one grand jury shall be summoned in each division of the court to inquire into all offenses committed or triable within said district, as well as those that are designated in Title I of this Act as those that are defined in other laws of the United States'."

It will be seen by a comparison with Section 10 as it is actually enacted and the reading above given to it by the lower court, the section by this reading is doubled in verbiage; the one sentence contained in Section 10 is split into two distinct propositions and the words "proceedings of the

grand jury" are made to modify only that portion of Section 10 which referred to crimes defined in other laws of the United States (and not in Title I). We respectfully submit that the construction is so remote that upon a reading of Section 10, together with the other sections involved in this question, the conclusion must be reached that the construction is one that would tax the ingenuity of any reasonable mind and does not carry with it any satisfactory conviction which would appeal either to the common sense of the bench and bar or to those rules in English construction by the aid of which the real intent and meaning of a legislature is arrived at.

The construction so adopted by the lower court is untenable and subject to the following criticisms:

a. Section 1, Part II of the Act of 1899 if given its widest reasonable scope leaves the pre-existing Oregon law in effect as to crimes not defined in Part I (this proposition has been previously discussed and disposed of at pp. 34-5 of this brief).

b. Giving to the phrase "proceedings of grand jury" (for the sake of argument) the reading attributed to it by the lower court and above set forth, nevertheless such reading does not justify the court's conclusion that a dual system of criminal procedure was thereby adopted.

c. Neither the Act of March 3, 1899, nor Section 10 of said Act changes the pre-existing law or

creates a dual system of procedure, but on the contrary the Act adopts one system of procedure and consolidates the Oregon practice with certain features of the Federal Statutes which were applied to the Act of 1884 by previous judicial decision where the laws of Oregon were discovered to have been inapplicable.

d. The opinion of the lower court ignores the scope of the enacting clause of the Act.

e. Ignores the plain meaning of the words in Section 10.

f. Violates the thoroughly well established general rule laid down with reference to the effect of territorial legislation upon the procedure of its courts.

g. Carries with it an implied intent to repeal the pre-existing law without respect to the stern and sound presumption of law against change in the law and implied repeal.

h. Violates the intent of the legislation so easily gathered from contemporary annotations set forth in the compilations of the Alaska Code.

It is apparent that Section 1024 has been by the lower court read into the Alaska *procedure* by applying the words "*proceedings* of the grand jury" as a modifying phrase only to that portion of Section 10 which refers to prosecutions for crimes defined in "other laws of the United States."

Conceding that Section 10 is entitled to the remote and ingenious construction attributed to it by the lower court in its statement of how the section should be read, the court has failed to justify the interpolation of Section 1024 into any *procedure* in the District of Alaska, because the words "*proceedings of the grand jury*" have not the scope to include the field of *criminal proceedure* covering the joinder of offenses or the consolidation of causes. The matter involved in this case is a question of general procedure and not of proceedings of the grand jury. In construing this particular expression the following must be borne in mind, that as a practical matter the grand jury has never had anything to do with questions of joinder or with questions as to the form of the indictment. From the earliest time such matters have come under the practical jurisdiction, first, of the prosecuting attorney, and, second, after the defendant appeared, of the Court. From the earliest times the indictment has always been drawn by the prosecuting attorney and he determines those questions of law which refer to the form and the method of drawing the indictment; the indictment having been formulated is then presented to the grand jury and voted upon by the grand jury either as "a true bill" or "not a true bill" and is there endorsed accordingly.

We have been unable to find any definition in the book construing the meaning of the phrase "proceedings of the grand jury," but it is a well known phrase and used frequently by digesters and en-

cyclopedists and the scope of the phrase is easily ascertainable by an examination of such works.

The Cyclopedia of Law and Procedure, Vol. 20, Article on Grand Juries by Horace E. Deemer, Chief Justice of the Supreme Court of Iowa, page 1293, gives a classification of those matters which come within the scope of the above phrase, which is as follows:

"Proceedings Before Grand Jury,

A. Presence of Accused,

B. Presence of Attorney for Prosecution,

1. In General,
2. Assistant Attorney or Special Counsel,
3. Private Prosecutor,

C. Presence of Presiding Judge,

D. Presence of Officers,

E. Presence of Stenographers,

F. Presence or Interference of Stranger,

G. Witnesses,

1. Summoning Witnesses,
2. Volunteer Witnesses,
3. Swearing Witnesses,
   a. In General,
   b. Form of Oath.

4. Examination and Control of Witnesses,

   a. In General,
   b. Recognizance of Witness,
   c. Mode of Examination,

H. Evidence Before Grand Jury,

1. Admissibility of Evidence,

a. In General,
b. Testimony of Accused,

2. Sufficiency of Evidence,
3. Minutes of Evidence,
4. Inspection of Premises,

I. Number of Grand Jurors Concurring in Finding,

J. Misconduct of Grand Jurors,

K. Secrecy,
1. In General,
2. Disclosure in Judicial Proceedings,
a. In General,
b. In Civil Proceedings,
c. Disclosure by Prosecuting Attorney, Witness, Etc.
3. Disclosure as Criminal Offense,

L. Advice of Court,

M. Executive Control Over Grand Juries,

N. Record of Finding and Proceedings,

O. Presumption of Regularity."

The same scope is given to the meaning of this phrase in the Encyclopedia of Pleading and Practice, Vol. 10, pages 344-5, in the subject classification at the beginning of the article on indictments.

The Century Digest, Vol. 24, columns 2752 and 2753, under the subhead "Conduct of Proceedings" gives the same scope and no wider to the meaning of the phrase.

How can it be said, therefore, that Section 1024 referring to consolidation and joinder of crimes in the drafting of an indictment for which the dis-

trict attorney is responsible comes within the scope of the words "proceedings of the grand jury"? The difficulty with the opinion of the lower court is that he has confounded the word "procedure" (or criminal procedure or court procedure) with the words "proceedings of grand jury." It is quite evident that the proceedings of the grand jury referred to in Section 10 of the Act relate only to those rules which govern the organization and conduct of the grand jury as a deliberate organization while they are in the course of their deliberations.

(c) *Neither the Act of March 3, 1899, nor Section 10 of said Act, changes the pre-existing law or creates a dual system of procedure, but on the contrary the Act adopts one system of procedure and consolidates the Oregon practice with certain features of the Federal Statutes which were applied to the Act of 1884 by previous judicial decision where the laws of Oregon were discovered to have been inapplicable.*

An examination of the constitution of Oregon in effect since prior to May 17, 1884, develops the true reason why the laws of Oregon were not copied into the Criminal Code instead of Section 10. Constitution of Oregon, Article 7, Section 18, ratified November 18, 1857, and approved by Congress February 14, 1859, reads as follows:

> "Sec. 18. Jurors. The legislative assembly shall so provide that the most competent of the permanent citizens of the *county* shall be

chosen for jurors; and out of the whole number in attendance at court, seven shall be chosen by lot as grand jurors, five of whom must concur to find an indictment. But the legislative assembly may modify or abolish grand juries." (Italics ours).

In Alaska, there is not now and never has been any *county* organization and therefore the law of Oregon was inapplicable to the local conditions and it became necessary to adopt some different method from that provided by the laws of Oregon for drawing grand juries, providing for the number that should make up a panel and providing for the number necessary to concur in order to find a valid indictment. Therefore it is not necessary to enter into the field of remote speculation and adopt the theory that by the enactment of Section 10 Congress intended to adopt a system of dual procedure in this territory where it existed in no other territory in order to explain the presence of Section 10 in the Alaska Code. The old Oregon Act of 1864, pursuant to the provision of the Constitution above cited, provided:

"An indictment cannot be found without the concurrence of at least five grand jurors and when so found must be endorsed 'a true bill,' and such endorsement signed by the foreman of the jury."

Section 29, Part II of the Alaska Criminal Code, provides:

"That an indictment cannot be found without the concurrence of at least twelve grand jurors

> and when so found it must be endorsed 'a true bill' and such endorsement signed by the foreman of the grand jury."

Senator Carter in his Annotated Alaska Code, page 49, foot notes, refers to Section 1021 of the Revised Statutes of the United States and Section 1259 of Hill's Annotated Laws as the combined source from which Section 29 of the new Code of Criminal Procedure was derived, so that it is apparent that Congress intended by Section 10 and by Section 29 to adopt the laws of the United States with reference to the drawing of the grand jury and to the number that should constitute a grand jury and the number who might find an indictment, and no distinction with reference to a dual system of procedure can be inferred from these two sections.

The difficulty in drawing a jury under the provisions of the Oregon Code in effect May 17, 1884, is clearly noted by Judge Deady in his opinion

(1886) *Kie vs. United States*, 27 Fed., 351.

At page 358, referring to the Oregon Code, he uses the following language:

> "The following sections of the Code, providing for the selection of jurors and the formation of a jury-list by the county court from the assessment roll are, of course, inapplicable, as there are neither county courts nor assessment rolls in Alaska."

In the case above cited Judge Deady held that the crime of murder as defined in Section 5339 R.

S. U. S., where the same is committed in any district or country under exclusive jurisdiction of the United States applied to Alaska and not the Oregon statute. He further held that the grand jury should be summoned and drawn in accordance with the provisions of the Revised Statutes of the United States, and then proceeds to use the following language:

> "But the question as to whom is *qualified* to serve as a juror in the District Court of Alaska must be answered by the law of Oregon."

Doubtless it will be claimed by the United States Attorney that some of the general expressions in the case of *Kie vs. United States* sustain the theory that where any law of practice in the state of Oregon conflicted with a law of practice used in the federal procedure, the federal procedure would control. It is true that some of the general expressions in Judge Deady's opinion are subject to such an interpretation, but the opinion does not discuss that question directly. The group of leading cases, in which *Hornbukle vs. Toombs* is one of the most prominent, is not mentioned in his opinion and the repeated expressions of this Court and the Supreme Court of the United States are in conflict with the language in the Kie case, upon which the United States may depend. The fact is that, owing to the county system in Oregon, the method of drawing a jury under those laws was "locally inapplicable," and it became absolutely necessary for Judge Deady to establish for Alaska a practice by which juries, both grand and pettit, might be drawn, and this

practice he did establish. The case is cited for the purpose of showing that the law laid down years after in Section 10 of the Alaska Code of Criminal Procedure did not differ in any way from the method prescribed in the decision of *Kie vs. United States.*

Section 10 simply provided a set of rules governing the drawing, summoning and organization of grand juries in the District of Alaska. An examination of Chapter 5, which is made up of Sections 10, 11 and 12, necessarily confirms the conclusion that a dual system of procedure was not intended.

Section 10 provides a method of summoning, drawing and organizing the grand jury in all cases and could not be copied from the Oregon law by reason of the county system in Oregon and therefore had the appearance of new legislation.

Section 11 defines the qualifications of grand jurors and is an exact copy of the Oregon law.

Section 12 names the persons who are exempt from jury duty and is an exact copy of the Oregon law.

It must be apparent that Congress instead of intending to establish a system of dual procedure, intended by the Act to merge both systems into one.

It is evident that there is no impediment to the sensible construction to the Code of Criminal Procedure to the effect that the Code provided a uniform system of procedure for the disposition of all

criminal cases, whether of local or general nature, except the language of Section 1, Part II of the Act, which read alone would apparently limit its application to those particular crimes defined in Part I.

We consider Section 13 of the Act as determinative of the proposition that all prosecutions were to be conducted in accordance with the methods of procedure laid down in the Act. Section 13 of the Act reads as follows:

> "Duty of the grand jury. The grand jury shall have power and it is their duty to inquire into *all* crimes committed or triable within the jurisdiction of the court and present them to the court either by presentment or indictment, *as provided in this Act.*"

This is an exact reproduction of the laws of Oregon (See Hill's Ann. Laws, p. 1242), with the exception that the words "jurisdiction of the court" are substituted for the word "county" as contained in the Oregon laws.

Section 36 of the Code of Criminal Procedure we believe also is determinative of the question in issue in this case. It provides as follows:

> "That the forms of pleading and rules by which the sufficiency of pleadings are to be determined are those prescribed by this Act."

Having already indicated by Sections 10 and 13 that the scope of the Act extended to all offenses, whether defined in Title 1 or by other laws of the United States, can it be sensibly or reasonably as-

sumed that Section 36 would have been enacted in the language above quoted if there had been an intention on the part of Congress to create a *dual* system of criminal procedure in the district? We cannot see how upon due consideration any answer can be given to the question except that it was intended that Section 36 of Chapter 7 and all the rest of the provisions of Chapter 7 should be applied to any and all indictments returned in the district.

Section 36 is the first section of Chapter 7, Part II of the Alaska Code, page 51. Section 37 reads as follows:

> "That the first pleading on the part of the United States is the indictment."

Section 38 is as follows:

> "That the indictment must contain—
>
> First. The title of the action, specifying the name of the court to which the indictment is presented and the names of the parties.
>
> Second. A statement of the facts constituting *the offense* in ordinary and concise language, without repetition, and in such manner as to enable a person of common understanding to know what is intended." (Italics ours.)

It is to be noted that the plural of the word "offense" is not used in this case.

This is one of the sections used by Mr. Justice Brown in the Fitzpatrick case, above cited, in testing the sufficiency of the indictment under the Oregon law. Section 39 sets forth a skeleton form of indictment. Section 40 provides:

"The manner of stating the act constituting the crime as set forth in the appendix of this Act is sufficient in all cases where the forms are given, where the forms there given are applicable, and in other cases may be used as nearly similar as the nature of the case will permit."

(This also is one of the sections referred to and used in testing the sufficiency of the indictment under the Oregon law in the Fitzpatrick case, *supra.)*

Section 41 provides:

"That the indictment must be direct and certain as it regards:

First. The party charged;

Second. The crime charged, and

Third. The particular circumstances of the crime charged when they are necessary to constitute a complete crime."

Section 42 provides for the indictment of the defendant by a fictitious name and the substitution of his true name upon discovery.

Section 43 is the section upon which the plaintiff in error relies and has been quoted before. It prohibits the statement of more than one crime in the indictment.

Section 90 provides the grounds of demurrer in a criminal case, among others,

"Second. That it (the indictment) does not substantially conform to the requirements of Chapter 7, Title II of this Act.

> "Third. That more than one crime is charged in the indictment."

Section 97 provides as follows:

> "That if the demurrer be disallowed the court must permit the defendant at his election to plead, which he must do forthwith, or at such time as the court may allow; but if he do not plead, judgment must be given against him."

The foregoing quotations from the Alaska Code, all of which, except Sections 1, 10 and part of 29, are copies of the old Oregon law, constitute, we believe, all of the sections having any material or vital bearing upon the case in issue.

(d) *The decision of the court ignores the scope of the enacting clause of the Act.*

Parts I and II of the Alaska Code constitute but one Act of Congress, the Act of March 3, 1899. The introductory language of this Act is as follows:

> "That the penal and criminal laws of the United States of America and the procedure thereunder relating to the District of Alaska shall be as follows:

Then follows Part I.

The lower court in considering the Act of March 3, 1899, has completely ignored this introductory language and we submit that the general scope of the entire Act, both with reference to substance and procedure, can better be determined from this introductory clause than from the introductory clause to Part II. There is no question but what the intro-

ductory clause to the entire Act shows that the Act was intended to give a general code of procedure for all penal laws of the United States in the District of Alaska. The introductory language of Part II has before been quoted. It is as follows:

> "That proceedings for the punishment and prevention of the crimes defined in Title I of this Act shall be conducted in the manner herein provided."

While both of these introductory clauses above quoted occur after the words "be it enacted" and might be technically called a part of the enacting clause, they are nevertheless in the nature of preambles and it is our contention that the words at the beginning of the enacting clause to the Act should define its general scope rather than the introductory words to Part II. As before said, both sections are more or less clumsy and crude. We submit that with reference to the substance of the Act they should be treated as in the nature of preambles.

It is clear from Section 10 and the other sections of the Act previously quoted in this brief that Congress intended to make the crimes defined in Title I of the Act offenses within the District of Alaska, and further intended to make other crimes defined by Statutes of the United States punishable within the District of Alaska, so that the general scope of the Act is to be determined really from its body and substance rather than from these introductory clauses and the introductory clauses must

be treated as preambles. If we are correct in this assumption, any conflict that may exist between the introductory language to Part II and any other part of the whole Act may be easily disposed of.

Mr. Black, in his book on Interpretation of Laws, Section 77, at page 178, lays down the rule which should be applied to both of these introductory clauses:

> "But while the uses of the preamble in cases of doubt or ambiguity are admitted, it is equally well settled that if the enacting clause is clear, sensible and explicit it cannot be controlled in its operation or extended or abridged by any considerations drawn from the preamble; for in such cases there is no room for construction and no need to resort to the preamble. An Act which is clear and specific in its enacting part will not be rendered inoperative or void by a defective or repugnant preamble."

These two sections in the Act of March 3, 1899, are the only sections which did not involve the close discriminating work necessary to condification of those laws of Oregon applicable to Alaska. All of the other sections incorporate some pre-existing law into the act and are, by their nature, worked into the act with care and deliberation. The two introductory clauses above mentioned were probably drawn after the codification was completed with a kind of a flourish and without deliberation, merely as introductions. We submit that they are to be treated simply as heralds of the Act, and cannot under any circumstances control the intent and

meaning which is to be gathered from the substantial portions of the Act.

(e) *The plain meaning of the words in Section 10 is ignored.*

We submit that no reasonable person reading Section 10 can gather from it any other reasonable intent than that the section was intended to indicate that the laws defined in Title I and other laws of the United States defining crimes applicable to the District were to be enforced under the provisions of the Act and that one grand jury only should have full jurisdiction to indict either for violations of Title I or for violations of other acts of Congress, and that such grand jury should be selected and summoned and their proceedings conducted in the manner prescribed by the laws of the United States (proceedings in that instance meaning the rules which governed the organization and conduct of a body while it was in deliberative session). We can imagine of no more remote or unnatural construction than to read into this Act a dual system of procedure, one for the crimes in Title I, and one for the crimes defined by other acts of Congress.

(f) *The opinion of the lower court makes Alaska an exception to the general rule.*

If the decision of the lower court is to be sustained, this Court is then forced to reach from the language of the Act of March 3, 1899, the definite conclusion that Congress intended to make Alaska

different from any other territory in the United States and exclude it from the operation of the general rule laid down in the case of *Hornbuckle vs. Toombs, Reynolds vs. United States*, and other cases cited, *supra*, including the decision directly applicable to Alaska in the case of *Fitzpatrick vs. United States.*

What conditions existed in Alaska to justify making Alaska the exception to a general rule adopted by the Supreme Court of the United States in a number of leading cases after very serious deliberation? What specific portion of the Act can be pointed out to justify such an extraordinary intention upon the part of Congress with reference to this particular territory?

(g) *The opinion of the lower court completely ignores the basic rules of presumption against change in the law and against implied repeal.*

The case of *Fitzpatrick vs. United States* settles beyond all question the doctrine that the procedure laid down in the laws of Oregon now incorporated in Chapter 7 of Part II, Act of March 3, 1899, must be observed in testing the sufficiency of an indictment under the Act of May 17, 1884. Therefore if the lower court is correct in its conclusion there was an express intention on the part of Congress to change the law as laid down in the case of *United States vs. Fitzpatrick* and to impliedly repeal the Act of May 17, 1884, as construed in the Fitzpatrick case.

What is there in the Act from which such an improbable intent can be gathered? Mr. Black in his work on Interpretation of Laws, Section 52, pages 110 and 112, lays down the two basic rules:

> "*Presumption against unnecessary change of laws. It is presumed that the legislature does not intend to make unnecessary changes in the pre-existing body of the law. The construction of a statute will therefore be such as to avoid any change in the prior laws beyond what is necessary to effect the specific purpose of the act in question.*"

At page 112 as follows:

> "Presumption against implied repealed laws. Repeals by implication are not favored. A statute will not be construed as repealing prior acts on the same subject (in the absence of express words to that effect) unless there is an irreconcilable repugnancy between them, or unless the new law is evidently intended to supersede all prior acts on the matter in hand and to comprise in itself the sole and complete system of legislation upon that subject."

The introductory section to Part II of the Alaska Criminal Code upon which is based the one justification which the lower court really gives for changing the construction of the law from that given in the case of *United States vs. Fitzpatrick.* As said before, if this section is to be given full effect against the reasonable intent and meaning of the Act, it simply means that the crimes defined in Title I shall be punished in the manner prescribed in Title II. No method by this section is provided for procedure in relation to crimes not defined in Title I of the Act

nor does the section read so that the procedure in relation to crimes not defined in Title I shall be changed from the rule laid down in *United States vs. Fitzpatrick* to any other method of procedure.

The Court of Appeals of the District of Columbia in the case of *Arthur Jackson vs. United States*, recently decided (March 4, 1912), has disposed of a very similar question to the case at bar and the language used by that court is extremely appropriate to the case at bar. The question involved in that case is the question as to whether the Crimes Act of March 4, 1909, providing that jury may qualify its verdict in a murder case by adding thereto the words "without capital punishment" applies to the District of Columbia, that is to say, whether the general legislation of the United States applies to the district or the particular legislation theretofore adopted with relation to the district. This case is to be found reported in Volume 40 of the Washington Law Reporter Advance Sheet No. 12, at pages 178 and 182, and in passing upon the question the court uses the following language:

> "The Federal Code embraces general legislation of general operation; the District Code local legislation of local operation. *An intent to affect or repeal the latter by the enactment of the former ought clearly to appear and will not be implied. Sullivan vs. Goldman, present term.* Congress has also given *Alaska* a comprehensive code of criminal law and *procedure especially suited to conditions there existing.* This tends further to support our conclusion

that the general provisions of the Federal Code were not intended to affect our local Code.

The judgment must be affirmed."

Following the general reasoning in that case we must be forced to the conclusion that the provisions of Section 43, Alaska Code of Criminal Procedure, must apply, and the provisions of Section 1024 of the Revised Statutes do not apply.

It is quite evident that Congress by the enactment of Parts I, II, III, IV and V of the Alaska Code did not intend to repeal the law of 1884 upon any matters not fully covered by the new law, and if the lower court were even correct in the assumption that the new Criminal Code of Procedure of March 3, 1899, had to do only with crimes defined in Title I, then the old law would still be in effect that an indictment could not join more than one crime. We are forced to this conclusion by an examination of the title to the Act of May 17, 1884, which is entitled "An Act providing a Civil Government for Alaska," and from the *title* of the Act of June 6, 1900, which is as follows: "An Act making *further* provision for a Civil Government for Alaska, and for other purposes."

We are further impelled to this conclusion by the statement of Senator Carter, the author of the Alaska Code (see Introduction to Carter's Code, pp. XVIII and XIX), wherein the author of the Alaska Codes of 1899 and 1900 uses the following language:

> "The codes make up the body of the work, but as certain acts of Congress antedating the last code may be only repealed in part,"

In this connection Senator Carter has printed the Act of May 17, 1884, as a part of the still existing law.

(h) *In its decision the lower court has entirely ignored the authoritative construction given to the Act by its author, Senator Carter, and by the author of the subsequent codification of the War Department, Mr. Paul Charlton. The codes of 1899 and 1900 were simply re-enactments of the old Oregon law.*

If the opinion of the lower court is to be understood at all it must be accepted upon the theory that the lower court has held that Section 1024 applies to indictments "under other laws of the United States not mentioned in Title I" and that the words "proceedings of the grand jury" in Section 10, Part II, referred to the crimes not defined in Title I, but in "other laws of the United States," and that thereby is read into the statutes of Alaska all of the general provisions with reference to federal criminal procedure contained in the Revised Statutes of the United States, including Section 1024, providing for joinder of separate offenses in one indictment. Granting every other hypothesis of the lower court to be correct except the conclusion above stated, the decision must fall and suffer reversal because of the untenability of the same.

In discussing this question we first desire to call this Court's attention to its own construction of the Alaska Code, to the effect that it was simply a compilation of the previous law. It is apparent that the new codification was hastily passed and that some of the expressions contained in the code cannot be strictly applied without defeating the general intent of the legislature and the ends of justice. No better illustration of the foregoing statement can be found than the decision of this Court in the case of

> *Tyee Consolidated Mining Co. vs. Jennings*, 137 Fed. 863.

In that case the Oregon law in effect on the 17th day of May, 1884, contained a proviso extending the period of the Statutes of Limitations for the period of one year so as to save litigants from surprise upon the enactment of the new statute. The clerk in charge of this codification, under Senator Carter's supervision, when the Oregon law was re-enacted in the Alaska Code, had this proviso reprinted and the contention in the case was that the period of limitation in all cases was again extended in the District of Alaska for one year. This Court adopted the sensible and reasonable view in the disposition of the case that the proviso should be disregarded and that the Alaska Code should be treated simply as a re-enactment of the old Oregon law. The Court, speaking through Judge Morrow, uses the following language:

"The act of Congress approved May 17, 1884

(chapter 53, 23 Stat. 24), had made the general laws of the state of Oregon the law in the District of Alaska, so far as the same might be applicable and not in conflict with the provisions of the act of Congress or the laws of the United States. The Alaska Code of Civil Procedure contained in the act of June 6, 1900, reenacted the Oregon Code of Civil Procedure, with some changes to conform to the new system of government established by the act. Sections 3 and 4 of Title 2 of the Alaska Code are almost exact copies of sections 3 and 4 of the Oregon Code of Civil Procedure. In section 4 of both codes there is this proviso:

'In all cases where a cause of action has already accrued, and the period provided in this section within which an action may be brought has expired, or will expire within one year from the approval of this act, an action may be brought on such cause of action within one year from the date of the approval of the act.'

"When this proviso was first introdurced into the law of Alaska by the Act of May 17, 1884, as part of section 4 of the Oregon Code, it served the purpose of preventing the injustice of suddenly introducing a statute of limitations into a new country. The proviso is a usual one in connection with statutes of limitations, and is intended to preserve whatever existing rights there may be at the time of their enactment for a short period, to enable parties to submit whatever claim of right they may have to the court for determination. This proviso served this purpose in the Oregon Code, and also at the time this Code was originally adopted for Alaska. But there was no necessity for it in the reenacted Code of Civil Procedure contained in the act of June 6, 1900. It had served its purpose once, and there was no need for it a second time. The act of June 6, 1900, did nothing more than

re-enact and print in the statutes of the United States the Code of Civil Procedure of Alaska which had been in force in that territory since May 17, 1884, and was plainly intended to add nothing to what had previously existed under that statute. The period of limitation for the commencement of this action expired under this statute on December 26, 1900, and, as this action was not commenced until June 3, 1901, it was properly dismissed."

This general rule of construction is certainly as applicable to one part of the Alaska Code as the other and should have the same weight in construing the Act of March 3, 1899, as was given to it in the case above stated in construing the Act of June 6, 1900.

Senator Carter in his introduction to the Alaska Code, upon this same question uses the following language:

"On May 17, 1884, just seventeen years, less thirty-four days, after the treaty of cession was ratified, an act entitled, 'An Act providing a civil government for Alaska' was approved. Section 7 of the act provided 'That the general laws of the State of Oregon now in force are hereby declared to be the law in said district so far as the same may be applicable, and not in conflict with the provisions of this act, or the laws of the United States.'

Inasmuch as the laws of Oregon had not been compiled for many years prior to 1884, it was something of a task to determine what the law of that state was on the day the act of Congress was approved, and a task more difficult still to ascertain with precision how far a given law of the state was applicable to the unique Alaskan conditions and not in conflict with any

law of the United States. The resulting doubts embarrassed the courts and the bar and sorely perplexed the people.

Such, however, was the state of the law in Alaska for the ensuing fifteen years. In 1898 Congress became deeply impressed with the growing importance of Alaska and thoroughly conscious of its duty to that long-neglected part of our possessions. The result was the passage of an act entitled 'An act extending the homestead laws and providing for right of way for rairoads in the District of Alaska, and for other purposes,' approved May 14, 1898. Also an act entitled 'An Act to punish crimes in the District of Alaska and to provide a code of criminal procedure for said district,' approved March 3, 1899; and finally an act entitled 'An Act making further provision for a civil government for Alaska, and for other purposes,' approved June 6, 1900.

The two acts last named embrace a criminal code, a code of criminal procedure, a political code, a code of civil procedure, a civil code, and certain license taxes for the district. The codes were mainly copied from the statutes of the State of Oregon, and to the end that adjudications by the Supreme Court of that State might remain as directly in point as possible, changes were sparingly made in the text of sections."

Mr. Charlton in his compilation of the acts of Congress relating to Alaska, Senate Document No. 142, published January 10, 1906, page 7, uses the following language:

"Organization of Civil Government.

Prior to the year 1884, Alaskan legislation was confined almost entirely to the protection of the seal fisheries and other fur interests of the

District. Offenses against the laws were prosecuted in the district courts of the United States in California, Oregon, or Washington. By the civil government act of 1884 the office of governor of the District was created, and Alaska was made a civil and judicial district; the clerk of the court acting as ex officio secretary and treasurer of the District. The act provides specifically that there shall be no legislative assembly in the District, and that no delegate shall be sent to Congress therefrom. The laws of the State of Oregon are made applicable to Alaska. The form of government established by this act of 1884 has undergone no substantial change, although the specific provisions of the act have been superseded by later legislation."

Senator Carter in his Code set out by way of annotation the source of every law incorporated, either directly or by implication, in the Code at the foot of each section. In speaking of this he uses the following language:

"Obvious convenience if not actual necessity seems to require that the laws of the district should be annotated and compiled for ready reference."

Wherever a statute of the United States with reference to criminal procedure was adopted, directly or by implication, Senator Carter cited the statute and the particular sections thereof so intended to be adopted in the footnotes to the section. For example, the chapter on Statutes of Limitation, Carter's Code, page 45, also the section modifying the Oregon law and requiring the concurrence of twelve grand jurors in finding a true bill (see Section 29,

Carter's Code, p. 49). One of the two sections upon which the court below bases the entire theory of his construction, to-wit: Section 1 of Part II., Carter's Code, page 44, contains no annotation because it is entirely new matter, and it is obvious that Senator Carter and the other members of the committee having the matter in charge did not construe this introductory section as adopting any general laws of criminal procedure of the United States in conflict with the specific provisions of the Act. But it is through Section~~s~~ 10 ~~and 11~~, by the theory of the opinion of the lower court, that Section 1024 of the Revised Statutes of the United States is read into the Alaska law and made a part thereof. It is by this section that the dual system of procedure, in the opinion of the lower court, an exception to the general rule, becomes effective in this territory. Let us see the contemporary construction placed upon it by the author of the Act.

> Carter's Code, p. 46, Section 10 and following annotations.
>
> R. S. ss. 808, 809, 810.

We have here, then, an authoritative statement from the author of the Code, made within a very short time after its passage, as to what portions of the Revised Statutes of the United States were thereby incorporated into the Code by reference or implication. The sections above referred to are sections of Chapter 15, Revised Statutes on Juries. Section 808 refers to the number of grand jurors and the method of completing the grand jury where

an insufficient number qualify. Section 809 provides for the appointment of a foreman by the court and gives him power to administer oaths. Section 810 provides for the manner in which the judge of the court shall order a grand jury to be summoned. It appears then that by reason of the enactments of Section 10 Senator Carter has not read into the Alaska Act the *general criminal procedure* of the United States for any purpose; he has taken the common ordinary meaning of the words, "proceedings of the grand jury," and read into the Act by implication those sections alone which refer to the drawing and to the proceedings of the grand jury as a deliberative body. Nor is Senator Carter alone in this construction. Mr. Charlton, in his compilation of January 10, 1906, page 156, in the marginal notes cites the following sections as having been read into the Act by the adoption of Section 10, to-wit: R. S. Sections 808-810, and Section 4, Chap. 114, 1 Supplement Revised Statutes, page 68. The only difference between Mr. Charlton's annotation and Senator Carter's is that Mr. Charlton has added Section 4 of Chapter 114, 1 Supplement, R. S. This is that section of the Civil Rights Act of March 1, 1875, which provides that no person shall be disqualified as a grand or pettit juror on account of race, color or previous condition of servitude. In the lower court no consideration was given to these authoritative and contemporary constructions given by the compilers of the only two Alaska Codes in existence.

In closing this discussion, with all due respect to

the opinion of the lower court and to the ingenious contention of the United States Attorney, we cannot refrain from saying that the theory of dual procedure in territorial courts, no matter how plausible or how ingenious it may have been originally, became a dead theory after the thorough and serious consideration given to it between 1870 and 1880 by the Supreme Court of the United States. Nor has the prosecution any right to expect to revive this theory by claiming Alaska as an exception to the general rule prevailing in other territories. The adoption by the lower court of this theory, together with the ingenious reconstruction of Section 10, we submit is without warrant in view of the well established principles with reference to the controlling doctrine of the superiority of local procedure and with the prevailing and already fully accepted doctrine that the codifications of 1899 and 1900 were simply a re-enactment of so much of the Oregon law as was not locally applicable to the conditions in the District of Alaska. In this connection, we cannot refrain from quoting from the appropriate language of the Supreme Court of Louisiana in *Childers. vs. Johnson*, 6 La. Ann. 634:

> "One of these presumptions is that the legislature does not intend to make any change in the laws beyond what it *explicitly* declares either in *express terms or by the unmistakable implication*, or, in other words, beyond the immediate scope and object of the statute. * * * It is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights or depart from the general sys-

> tem of law without expressing its intention with clearness; to give any such effect to general words, simply because in their widest and, perhaps, natural sense they have that meaning, would be to give them *a meaning in which they are not really used.*"

RECAPITULATION.

At the risk of being tedious, we shall venture to recapitulate the main points in this argument, so that they may be understood, in a few words.

First: Section 1024 of the Revised Statutes of the United States, adopted by Act of February 26, 1853, had no application whatever to any courts except United States Circuit and District Courts. No provisions of the Act have ever been applied to territorial courts except provisions with reference to fees in those particular cases wherein by subsequent legislation the provisions of the Act were extended to certain territories specifically named. Alaska was not one of these territories.

Repeated decisions in unmistakable language have held that the District Court for the District of Alaska is not a United States Circuit or District Court.

Second: No rule of law in the Supreme Court and in the Circuit Court of Appeals is better established than that the local procedure adopted for a territory controls and has application instead of the

general rules of procedure relating to federal practice.

Nor is any rule of law better settled that, while a *jurisdiction* may exist in a territorial court (which in states would be dual), there is no such doctrine as the doctrine of *dual procedure.*

Third: Observing all of these rules, Congress has found it necessary in particular instances, such as bigamy and kindred crimes, to specially authorize the statement of more than one crime in the indictment so as to obviate the necessity of following the local statutes, but no such acts of Congress apply to the crimes charged in the indictment in this case.

Fourth: That that chapter of the laws of Oregon governing the drawing of indictments has been specifically recognized as the law by which indictments are to be tested in Alaska.

Fifth: That if the new Code of Criminal Procedure by the introductory section, Section 1, is to be limited in its application to the crimes defined in Title I. of the Act of March 3, 1899, then the old law prevails with respect to other crimes, and should be applied as it is applied in the Fitzpatrick case, and this case must, nevertheless, be reversed.

Sixth: Applying, however, the true test to the Alaska Code of 1899 and 1900, it must be construed as a compilation of the Oregon laws previously in effect and found to be applicable to the conditions in

the district. That the old law was not changed, and that, by reason of the presumption against the change of the law and against implied repeal, and by reason of the annotations and explanations given by the compilers of the law, Section 1024 was never made applicable to the District of Alaska, and this case is governed by the rule laid down in Section 43, Part II., of the Code of Criminal Procedure.

SECOND SPECIFICATION OF ERRORS.

Seventh: IF THE THEORY OF THE LOWER COURT SHOULD BE ADOPTED, GIVING A RESTRICTIVE CONSTRUCTION TO THE INTRODUCTION OF PART II. OF THE CRIMINAL CODE, THEN THE SAME THEORY MUST BE EXTENDED TO THE INTRODUCTION OF PART I. OF THE CRIMINAL CODE AND SECTION 5209 OF THE REVISED STATUTES RELATING TO OFFENSES AGAINST THE NATIONAL BANKING LAW MUST BE HELD NOT APPLICABLE TO THE DISTRICT.

If this court should hold that the lower court was correct in its construction of Section 1, Part II., of the Alaska Criminal Code of Procedure, and that by reason of the peculiar language of that section the application of Section 43 of Part II. is to be strictly limited, then the same force and effect and the same restricted construction must be given to the introductory language to Part I. of the Criminal Code, which is as follows:

> "That the penal and criminal laws of the United States of America and the procedure

> thereunder relating to the District of Alaska shall be as follows:";

which would result in the inevitable conclusion that no criminal laws of the United States were applicable to Alaska except those defined and made punishable by the provisions of the Act of March 3, 1899, and the inevitable result would be that this court must hold that unless Section 5209 has been made applicable to the District of Alaska subsequent to March 3, 1899, and acts thereby denounced, do not constitute a crime within the district.

An examination of the United States Statutes since March, 1899, shows conclusively that the acts denounced as crimes by Section 5209 have not since been declared to be crimes in the district. For the above reason, then if this Court should concur with the lower court in its theory of restricted construction, it must necessarily hold that the indictment as a whole and none of the counts thereof stated a crime, and further hold that the grand jury had no legal authority to inquire into the charge. Both of these points were taken in the demurrer and overruled by the lower court.

THIRD SPECIFICATION OF ERROR.

Eighth: THE RECORD IN THIS CASE DOES NOT SUSTAIN THE JUDGMENT.

When the defendant in this case ascertained that, contrary to the provisions of Section 43 of the Alaska Code of Criminal Procedure, he was going to be forced to trial upon fifty-six separate crimes, he elected to stand upon his demurrer pursuant to Section 97, Alaska Code of Criminal Procedure, and thereupon sentence was imposed upon him without trial, and a judgment of conviction on each of the counts rendered against him. Claiming the protection thereof, the plaintiff in error makes the objection that he was thereby deprived of the protection of the sixth amendment to the Constitution of the United States.

It is possible that the claim will be made by the United States Attorney that the defendant waived his right to the jury trial which is guaranteed to him by the Constitution of the United States as applied in the case of

Rasmussen vs. United States, 197 U. S., p. 516.

But it seems that the right cannot be waived.

Thompson vs. Utah, 170 U. S. 343.

We do not apprehend that the United States will be permitted to take advantage of the only effort that the defendant could make *to prevent, before trial*, the denial to him of the ben-

efit of the provisions of Section 43. If the decision of the lower court be sustained, certainly this Court will not permit a judgment to stand which is based on local practice, because if sustained at all it must be on the theory that the local practice does not apply.

We respectfully submit that the demurrer to the indictment should have been sustained and that the judgment of the lower court in this case should be set aside.

Respectfully submitted,

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No. 2177

United States
Circuit Court of Appeals
For the Ninth Circuit.

C. M. SUMMERS,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Brief of Defendant in Error.

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Circuit Court of Appeals for the Ninth Circuit, at San Francisco.

No. 2177.

C. M. SUMMERS,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

STATEMENT OF THE GOVERNMENT'S POSITION.

This is a criminal prosecution for violations of section 5209, R. S., which section is a part of the national banking act of the federal Government and designed to enforce the administrative provisions of that act. The indictment contains 56 separate counts and is prepared in conformity with the provisions of section 1024, R. S.

This indictment is attacked by demurrer, on the ground that by reason of the fact that it contains more than one count, it is in violation of section 43 of the Alaska Criminal Practice Code. The prosecution answers that the crimes charged are "federal crimes," as distinguished from local crimes, and that, therefore, the Federal Practice Code, and not the local Alaska Practice Code, must govern the proceedings. The Government contends that in Alaska two separate systems of criminal prosecution obtain: prosecutions under laws enacted by Congress in its capacity of a federal legislature, and prosecutions under laws

enacted for Alaska by Congress sitting as a territorial legislature. The Alaska Criminal Practice Code of 1899 was enacted by Congress in its latter capacity, and its provisions were not intended to effect any change either in the substantive laws of a federal character or in the laws of procedure devised for the enforcement of the federal laws. This will not only appear from the language of the code itself, but from the history of its enactment as well as from numerous provisions both in the local and federal laws which in themselves clearly presuppose the application of the federal practice to the federal offense.

Before proceeding with the argument it should be distinctly borne in mind that though an act be denounced by Congress as a crime, it is not thereby a "federal" crime as distinguished from a local or territorial crime. Congress has two distinct functions: that of a federal legislature and that of a territorial legislature. As a federal legislature it has only such powers as the Constitution in express language has conferred upon it, all other powers being by implication deemed reserved by the States. As a territorial legislature it has all such power as the Constitution has not expressly withheld. In its capacity as a territorial legislature Congress may delegate its power to local legislatures, but its power as a federal legislature cannot be delegated. This duality of jurisdiction results in placing the stamp of federal legislation upon some enactments of Congress and that of local legislation upon other enactments and confers a dual jurisdiction upon the territorial courts.

In support of its position the Government proposes to show:

1. The history of the Alaska Code discloses the intent of Congress to have it apply only to local offenses and to maintain thereafter the dual character of the District Court of Alaska and its practice.

2. The Alaska Practice Code of 1899 expressly forbids its application to federal offenses.

3. The federal criminal practice is specially devised by Congress for the enforcement of federal authority, and necessity dictates that the federal remedy follows the federal right.

4. Certain provisions of the Alaska Code are clearly inapplicable if the federal penal laws are to be uniformly administered and enforced.

5. Federal laws are drafted with a view to their enforcement by federal procedure and certain provisions of these laws are capable of enforcement only under such procedure and indicate, therefore, that the latter must be applicable to these cases.

6. The application of local procedure to federal crimes would lead to conflict of authority and would result in crippling the federal sovereign.

7. The course of congressional legislation and the decisions thereunder prove that Congress could not have intended that local procedure be applied to federal offenses.

8. The general laws of the United States have been extended to Alaska, and such extension in itself made the federal procedure applicable by force of the doctrine enunciated by the Supreme Court in Page vs. Burnstine, *infra.*

9. The decisions cited by counsel for plaintiff in error are not to the point because they are decided under entirely different statutes and different facts from those herein involved and are in no manner controlling, nor even applicable.

10. The practice before the Alaska courts in federal cases is now, and in the past has been, to follow the rules of federal practice.

11. The history of section 1024 shows that in its original form that section was inserted into the general laws for the purpose of restraining the officials of the Courts from accumulating unnecessary and unreasonable fees by a mutiplicity of suits which ought to be joined. The same fee system having been extended to Alaska, it must be presumed that it was the intention of Congress that it would be subject to the safeguards which circumscribed it in the States, of which safeguards section 1024 was and is one.

12. The alleged error complained of is technical and not substantial; it goes only to the form of the indictment, not to the merits of the case, and even were the indictment technically defective, that defect was waived by defendant when he refused to deny the truth of the allegations, but demurred and demanded to have judgment entered upon the general demurrer without trial. He cannot now allege error upon a ruling which might not have injured him had he gone to trial and could not have injured him had he stood trial and been acquitted.

13. The proceedings resulting in judgment are tantamount to a plea of *nolo contendere,* which has

the same force and effect as a plea of guilty, and after a judgment upon a plea of guilty no objection can be urged, except to the jurisdiction of the Court, and the general one that the indictment does not state facts constituting a crime. All other objections, though made in due time, are waived.

ARGUMENT.

I.

THE PROVISIONS OF THE ALASKA CODE.

A.

History of Enactment in Question.

A civil government was first provided for Alaska by the Act of May 17, 1884. By section 7 of that Act it was provided "that the general laws of the State of Oregon now in force are hereby declared to be the law in said District, so far as the same may be applicable and *not in conflict with* the provisions of this Act or *the laws of the United States.*"

It is very evident that the criminal practice code of Oregon thus extended to Alaska would come in conflict with the federal practice provisions whereever an attempt was made to apply it in the prosecution of federal offenses. It is now well settled that by the Act of May 17, 1884, Alaska became an organized territory, and that, by reason of that fact, all general laws became applicable to Alaska by force of section 1891, R. S., as well as by force of the express provisions of Section 9 of the Act of 1884.

Nagle vs. U. S., 191 Fed. 141.

I. C. C. vs. U. S. ex rel. Humboldt S. S. Co., decided April 29, 1910, by Supreme Court.

Among these laws of general application which thus became extended to Alaska were the various provisions of the federal laws relating to practice and procedure.

Page vs. Burnstine, 102 U. S. 664 (quoted p. 56).

Kie vs. United States, 27 Fed. 351 (356).

That the practice provisions of the federal courts became extended to Alaska by Act of 1884 was early recognized and forever settled by the decision of Judge Deady in Kie vs. United States, where it is held:

> "So far as the laws of the United States prescribe the jurisdiction of the District and Circuit Courts, *or the method of their procedure,* or define a crime and prescribe its punishment, the Alaska Court is governed by them, and when these are silent, or make no provision on the subject, resort must be had to the laws of Oregon, so far as they are applicable."

And again in the same decision:

> "No law of Oregon is to have effect in Alaska if it is in conflict with a law of the United States. There is such a conflict, within the meaning of the statute, not only when these laws contain different provisions on the same subject, but when they contain similar or identical ones. In the latter case it is the law of congress that applies, and not that of the state."

The Oregon practice was, therefore, pursuant to the terms of the aforementioned section 7, in the prosecution of federal offenses, in conflict with the

federal law. In practice the operation of the Oregon law was confined to the crimes denounced by the Oregon Code and such other laws of a local nature as Congress enacted exclusively for Alaska. Though Alaska was under the exclusive jurisdiction of Congress, the courts discharged dual functions: those of a territorial tribunal and those of a federal tribunal. In this respect it was not different from the courts in the territories.

Ex parte Crow Dog, 109 U. S. 556 (560).
U. S. vs. Folsom, 38 Pac. 70.
Gon-shay-ee, 130 U. S. 343 (348).
Billingsley vs. U. S., 178 Fed. 653.
U. S. vs. Pridgeon, 153 U. S. 48.

In the first of the above cases the Supreme Court said:

> "The district court has two distinct jurisdictions. As a Territorial court it administers the local laws of the Territorial government; as invested by act of Congress with jurisdiction to administer the laws of the United States, it has the authority of circuit and district courts."

In the Folsom case, the Court, holding that the United States practice provisions applied to federal cases in a territorial tribunal, said:

> "We are also of the opinion that, in any event, the territorial law would not apply in this case, as the jurisdiction of the district courts in trying offenses of this character is as separate and distinct from the jurisdiction in trying territorial causes as is the jurisdiction of state courts and United States courts held within the States."

This dual jurisdiction of the court was carried out by dual means. To illustrate: Section 1230, Hill's Annotated Oregon Code provided:

> "A grand jury is a body of men, *seven* in number, drawn by lot from the jurors in attendance upon the court, having the qualifications prescribed by chapter 12 of the Code of Civil Procedure, and sworn to inquire of crimes committed or triable within the county from which they are selected."

While such a grand jury would be perfectly legal for the purpose of prosecution for violations of the Oregon laws made applicable to Alaska, it would be altogether inadequate for inquiring into and indicting for violations of the federal laws. At the very inception of criminal prosecution within the District of Alaska there were, therefore, necessarily two methods of proceeding concomitant with the two jurisdictions.

The same duality of the Government is recognized in section 2 of the Act of 1884, defining the duties of the governor: "To the end aforesaid he (the governor) shall have authority to see that the laws enacted *for said district* are enforced. . . . He may also grant reprieves for offenses committed against the laws of the *district* or of the *United States.*" . . . .

The laws of the district and the laws of the United States are here placed in juxtaposition and treated as two separate bodies of laws. The authority of the governor is confined to the laws of the district, except that he may grant reprieves for offenses committed

against the laws of the United States as well as for those committed against the laws of the District.

B.

Express Intent of Congress.

These dual functions of our courts were clearly appreciated and purposely retained by Congress when the Act of March 3, 1899, was prepared. The enacting clause of that law provides:

> "That the penal and criminal laws of the United States of America and the procedure *thereunder* relating to the District of Alaska shall be as follows."

"Procedure thereunder" cannot be interpreted to mean procedure under *any* law, but only under the laws created by that Act. It is obvious that at the very outset the limitations upon the scope of the Act had been determined upon and were kept in mind and emphasized.

Title I, being Part I of the Carter Code, then defines the crimes. Then follows the Code of Procedure, being Title II of the Act of March 3, 1899, otherwise known as Part II of Carter's Code. The first section is significant, and reads as follows:

> "That proceedings for the punishment and prevention of the crimes *defined in Title I of this Act* shall be conducted in the manner herein provided."

This section carries out the determination manifested in the enacting clause and expressly and carefully restricts the operation of this Practice Code to the crimes defined in Title I, for to say that it shall

apply to one class of crimes is tantamount to saying it shall not apply to any other, under the familiar canon of statutory construction that *expressio unius est exclusio alterius.* To hold in face of the language of this section that this code nevertheless applies to all crimes, whether of a national or local character, would be to do violence not only to the most obvious import of ordinary English words but to the most universal canon of statutory construction.

All the subsequent sections of this code must be read in the light of this explicit limitation of their applicability.

C.

Section 10, Alaska Code.

It is argued for plaintiff in error that section 10 of the Practice Code in question, which provides for a grand jury, is in conflict with section 1 above quoted, and shows the intent to apply the same proceeding in all prosecutions, but we submit that section 10 is a confirmation of the congressional intent expressed in section 1. For the convenience of the Court the section in question is quoted in full:

> "That grand juries, to inquire of the crimes designated in title one of this Act, committed or triable within said District, shall be selected and summoned, and their proceedings shall be conducted, in the manner prescribed by the laws of the United States with respect to grand jurors of the United States district and circuit courts, the true intent and meaning of this section being that but one grand jury shall be summoned in each division of the court to inquire into all of-

fenses committed or triable within said District, as well those that are designated in title one of this Act as those that are defined in other laws of the United States."

This section clearly contemplates the dual jurisdiction of the courts and the two systems of procedure, but it changes the old rule prevailing under the Oregon law above referred to, and provides that the same grand jury which is necessary in federal cases may also "inquire of the crimes designated in title one of this Act." The section is avowedly framed to obviate the old necessity of two separate grand juries. The "true intent being" that the one grand jury shall "inquire into all offenses, *as well* those that are designated in title one of the Act as those that are defined in other laws of the United States." It is evident Congress realized that the Act in question was so obviously limited to local or territorial crimes by section 1 and the enacting clause that the grand jury provided for by the Act would have no jurisdiction to inquire into federal offenses unless that authority was expressly conferred on that body.

D.

Section 13, Alaska Code.

Section 13 reads as follows:

"The grand jury shall have power and it is their duty to inquire into all crimes committed or triable within the jurisdiction of the Court and present them to the Court either by *presentment*, or *indictment*, as provided in this Act."

It is argued for plaintiff in error that this section overrides section 1 and commits the grand jury in all cases to the proceedings prescribed by the Alaska Code, and, therefore, makes section 43 applicable both to federal and local crimes, but it is evident that this section refers to the work of the grand jury sitting as a territorial tribunal dealing with infractions of the territorial code alone. Any other construction would render section 1 nugatory, which is not permissible if the two can be harmonized. In other words, section 13 must be construed in light of the general limitation imposed by section 1. As has already been pointed out, the Oregon law was by the Act of May 17, 1884, made applicable only where there was no general or special federal law covering the subject. It was a temporary arrangement to provide for a local government. It must also be obvious that the Alaskan Penal Code of March 3, 1899, was enacted to supersede the Oregon Code in the particular field it covered, for the former is almost in its entirety taken from the latter. If, therefore, it had been the intent of Congress to revolutionize the whole practice and make this practice code control in both federal and territorial cases, that intent would most naturally have been expressed in unequivocal language by the Act itself; but the contrary is the case. The very opposite intent is expressed, to guard against every possible excuse for misunderstanding.

The mystery about section 13 arises from the fact that it is taken with its surroundings bodily from the

Oregon Code, being section 1242 of Hill's Annotated Laws of Oregon. Where it was taken from it refers only to local crimes and local proceedings and should not now be construed to refer to national crimes. In other words, by retaining section 13 in the same form in which it already applied to Alaska as part of the laws of Oregon, it was not intended to change its meaning or extend its application.

But upon closer inspection there is not even in the language of section 13 any conflict with the language used in sections 1 and 10. This has been clearly pointed out by Judge Lyons in his discussion of this subject set out in Appendices A and B. Section 1 provides that the practice provisions of the Code shall apply only to the local crimes; but section 10 declares that the one grand jury shall have jurisdiction over both classes of offenses, and adds that its "proceedings shall be conducted in manner prescribed by the laws of the United States with respect to grand juries of the United States District and Circuit Courts." That is, when sitting as grand jurors of United States District or Circuit Courts, i. e., in federal offenses, it shall proceed according to the rules prescribed for those courts.

Counsel has endeavored to prove that Judge Lyons has confused the term "proceeding" with that of "procedure," but it is evident that the confusion is counsel's, not the Court's. The relation as well as the distinction between these two terms is very simple and easily comprehended, viz., the "proceedings" of a court are those acts which a court *does;* the "procedure" is the *rules by which* the court does

them. The proceedings of a grand jury are the acts of a grand jury, while the procedure is the law or rule pursuant to which the acts are done. All proceedings are thus governed by the procedure.

Where, therefore, section 10 says that the proceedings shall be governed by a certain law it is tantamount to saying that they shall be governed by a certain procedure, namely, the procedure laid down by that law, in this case the law of procedure governing the United States Circuit and District Courts. Where section 13, therefore, says that the grand jury shall present all crimes either by *presentment* or *indictment* "as provided in this act," it is in perfect harmony with both section 1 and section 10, for those sections clearly point out the two procedures, or, to save confusion, the two rules of proceeding, the federal and the local.

E.

Rules of Construction Applicable.

The cardinal canon of statutory construction imposes upon the Court the primary duty of seeing that no part of a statute is annihilated by judicial interpretation. If two sections of a statute are seemingly conflicting, it is the first duty of the Court to endeavor to harmonize the two and let neither perish. Where one part of a statute is susceptible to two constructions and the language of another part is clear and definite and is consistent with one of such constructions and opposed to the other, that construction must be adopted which will render all clauses harmonious.

36 Cyc. 1132.

Words should sometimes be given a narrower meaning by the Courts than they apparently at first blush import. As was said by Chief Justice Taney in Brewer vs. Blougher, 14 Peters, 177 (197):

> "It is undoubtedly the duty of the court to ascertain the meaning of the legislature, from the words used in the statute, and the subject-matter to which it relates; and to restrain its operation within narrower limits than its words import, if the court are satisfied that the literal meaning of its language would extend to cases which the legislature never designed to embrace in it."

On the same subject,—the various provisions of an act should be read so that all if possible have their due and conjoined effect. To use the language of Chief Justice Marshall in Pennington vs. Coxe, 2 Cranch, 33 (52):

> "That a law is the best expositor of itself; that every part of an act is to be taken into view, for the purpose of discovering the mind of the legislature, and that the details of one part may contain regulations restricting the extent of general expressions used in another part of the same act, are among those plain rules laid down by common sense for the exposition of statutes, which have been uniformly acknowledged."

To paraphrase the language of Judge Sanborn in U. S. vs. 99 Diamonds, 139 Fed. 961 (963), and apply it to the case at bar, it may be said that the construction of the Alaska Penal Code contended for by plaintiff in error "flies in the teeth of the maxim that all

the words of a law must have effect rather than that part should perish by construction." To hold that the Alaska Practice Code applies to all offenses is to annihilate section 1, Title II, and the enacting clause of that code.

The various sections and enactments involved in this subject are, however, so carefully analyzed by his Honor, Judge Lyons, in the written opinion rendered last April in the case of United States vs. The North Pacific Wharves and Trading Company et al., and for the convenience of the Court attached to this brief as APPENDIX A, that nothing further remains to be said on this feature of the case. Two oral opinions by the same learned jurist in the case at bar, referring to the opinion in the case last above mentioned, are also hereto attached as APPENDIX B.

II.

REASON AND NECESSITY DICTATE THAT THE FEDERAL REMEDY FOLLOW THE FEDERAL RIGHT.

It is not necessary to place upon narrow grounds or even upon explicit language the argument that the Alaska Criminal Code of Procedure should not be followed in prosecutions for federal offenses, for independently of the fact that such a course of proceeding is not authorized either by our code or by the decisions, it is not in consonance with common sense or reason. The District Court is given the power, and it is its duty where a federal offense is charged, to exercise the jurisdiction of the Circuit

and District Courts of the United States. How can it exercise that jurisdiction if it cannot make use of the same procedure that they use? The District Court not only has such jurisdiction—it is not only the static possessor of such jurisdiction, but it is to exercise it, to bring it into action. Now, in the nature of things, it can do so in fullness and completeness only by following the same procedure which prevails in those courts.

Will the court of Alaska be required to exercise the functions of these federal tribunals, and at the same time be denied the right to employ the same instrumentalities of procedure devised for the discharge of these duties? It is the contention of the Government that these instrumentalities were provided by Congress as the means of enforcing federal authority generally, and it must of necessity follow that authority, as an integral part of it, into whatever court upon which that authority is bestowed.

This becomes especially evident where the "administrative laws," so called, are involved, such as the land laws, the customs laws or, as in this case, the banking laws. All these enactments bear internal evidence of having been drafted with a view to their enforcement through the medium of the federal procedure.

Illustration.

A forcible illustration of how the remedy must follow the right is also afforded by the various statutes of limitation of actions prescribed by the general federal laws.

The limitation of actions for forfeitures and penal-

ties is by section 1047, R. S., fixed at *five* years, and section 1046, R. S., provides:

> "No person shall be prosecuted, tried, or punished for any crime arising under the revenue laws, or the slave-trade laws of the United States, unless the indictment is found or the information is instituted within *five* years next after the committing of such crime."

Both of these sections are in conflict with any provision of any purely territorial code which could be brought to bear on the subject. Both sections relate purely to procedure. Neither establishes any right or duty, neither is a rule of property, or any other form of substantive law; each is solely the law of the forum. In that respect it is in class with section 1024 here in question.

Will it be contended that these sections (1046 and 1047) do not apply either in Hawaii or in Alaska? Surely not. They are part and parcel of the rights and duties which they are devised to enforce. But if these two practice provisions apply no legal reason can be assigned for not applying with equal force in the same character of cases section 1024. It is a case of a distinction without a difference. To hold that section 1047 extends to Alaska, but at the same time hold arbitrarily and without reason that section 1024 does not, will reduce legal logic in the mind of the layman to a hypocritical farce.

This very question arose in the Folsom case, and the court promptly held that the federal statute of limitation applied. Consistently with this ruling and upon the same logic the Court held in the same deci-

sion that section 1024 applied.

Even at the present time the question is before the prosecuting officers, and may soon be before the courts of Alaska, as to whether or not action for forfeitures and penalties imposed by the federal immigration laws must be commenced within one year as prescribed by the Alaska code or within five years as provided by R. S.

The immigration act of February 20, 1907, as amended by act of March 26, 1910, provides that any person or corporation guilty of importing contract labor shall forfeit the sum of $1,000 for each offense, and that this penalty may be sued for and recovered either by the Government or by a private individual. Sec. 1047, R. S., provides such action may be brought within five years, while section 10, Part IV, Code of Alaska, fixes the limitation in actions for forfeitures and penalties to one year. Which prevails? We have found no difficulty in arriving at the conclusion that Congress aimed to have the law enforced by means of the federal machinery.

A strong statement of this principle here presented is to be found in the dissenting opinion of Chief Justice Zane, of the Supreme Court of the Territory of Utah, delivered in the case of United States vs. Jones et al., 18 Pac. 233 (5 Utah, 552). In that case two defendants were accused of the crime of bribing a United States officer, in violation of section 5451 of the Revised Statutes of the United States. They demanded separate trials under the provisions of a territorial statute; their demand was refused by the trial court and the refusal was alleged as error. The Chief Justice says:

"The general rule is that persons jointly indicted are tried together. . . . . But, conceding that the general rule is that the court may grant a separate trial in its sound discretion for a cause shown, it is claimed that the practice in the case in hand is controlled by section 262, Laws Utah, 1878:

" 'When two or more defendants are jointly indicted for a felony, any defendant requiring it must be tried separately. In other cases the defendants jointly indicted may be tried separately or jointly, in the discretion of the court.' Should this territorial statute be applied to a criminal case under the laws of the United States? One sovereignty has no power to make laws for another. It is true that Congress may adopt rules of practice enacted by a state, but in criminal prosecutions for violations of the laws of the United States congress never adopts the rules of practice enacted by the state legislature. It is also true that the territorial government is not a sovereignty. It is a government, however, whose legislative power extends to all rightful subjects of legislation consistent with the constitution of the United States and the laws thereof. It has powers to make laws for the territory, not for the United States. It possesses such power as congress has given it. In section 6 of an act to establish a territorial government for Utah, congress has declared 'that the legislative power of said territory shall extend to all rightful subjects of legislation consistent with the constitu-

tion of the United States and the provisions of this act.' And in section 9 of the same act, after mention of the supreme, district, and probate courts, and justices of the peace, the following language is found: 'The jurisdiction of the several courts herein provided for, both appellate and original, ... shall be as limited by law, ... and each of the said district courts shall have and exercise the same jurisdiction in all cases arising under the constitution and laws of the United States as is vested in the circuit and district courts of the United States.' Similar language is found applicable to all the territories in section 1910 of the Revised Statutes of the United States. The district courts in the territories are required to exercise the same jurisdiction in all cases under the constitution and the laws of the United States as is vested in the circuit and district courts thereof. The territorial legislature had no power to restrain or control the district court in the exercise of its powers and jurisdiction in any cases arising under the laws of the United States. Its authority was such as the circuit and district courts possessed, and it had the power to exercise it to the same extent as those courts might. The jurisdiction of a court consists of its lawful authority to act as a court. The jurisdiction of a court embraces all the discretion it may lawfully exercise, and every decision and order it may lawfully make, every writ that it issues, and every judgment that it pronounces. The juris-

diction of a court, the authority of a court, and the powers of a court, are synonymous terms. Their legal meaning is the same. The jurisdiction of the circuit and district courts of the United States embraces their authority to order the separate trials of parties jointly indicted, the making of such an order either denying or granting a separate trial is as much an exercise of the jurisdiction of those courts as the making of any other decision or entering any judgment in the case, interlocutory or final. In the case of Hopkins vs. Com., 3 Metc. 460, the supreme court of Massachusetts, Shaw, C. J., delivering the opinion of the court, said: 'The word "jurisdiction" (*Jus dicere*) is a term of large and comprehensive import, and embraces every kind of judicial action upon the subject-matter, from finding the indictment to pronouncing the sentence. . . . . To have jurisdiction is to have power to inquire into the fact, to apply the law, and to declare the punishment in a regular course of judicial proceeding.' . . . . These two cases establish clearly that jurisdiction includes the power of the court to issue all lawful writs and the making of all lawful rulings, orders, and decisions. All its lawful action is exercise of its jurisdiction. The powers of a court constitute its jurisdiction. If the circuit and district courts of the United States possess the jurisdiction, the authority to grant or deny separate trials, in their discretion, then the third district court in the case in hand possessed the

same authority, the same power, the same jurisdiction."

And again the Chief Justice says:

"The United States court, having the power, may adopt the same rules of practice as the state courts are governed by. In criminal trials, under the laws of the general federal government, the courts do not adopt rules of practice prescribed by state legislatures. Section 914 of the Revised Statutes of the United States, in force June 1, 1872, changed the rule in certain civil cases. It is: 'The practice, pleading, and forms and modes of proceeding in civil causes other than equity and admiralty causes, in the circuit and district courts, shall conform as near as may be to the practice, pleading, and forms and modes of proceeding existing at the time in like causes in the courts of record in the state within which such circuit or district courts are held, any rule of court to the contrary notwithstanding.' Congress has always been careful to leave the practice in the trial of crimes against the United States the same throughout its jurisdiction. Its definitions of crime are the same within the limits of its jurisdiction, and the practice and evidence for the trial of persons charged with crimes against its laws should also be uniform. For the same kind of offenses against the federal government persons accused of crime should not be tried according to different rules of evidence and practice in different parts of the country. Such rules ought to be of

general application throughout its jurisdiction. Section 1891 of the Revised Statutes of the United States declares that 'the constitution and all laws of the United States, which are not locally inapplicable, shall have the same force and effect within all the organized territories, and in every territory heretofore organized, as elsewhere within the United States.' Federal laws defining crimes and providing for their punishment are enforced and made effectual by means of a trial and conviction, and if the territorial legislature may prescribe rules of evidence and practice to be applied in such trials, then the effect of the laws defining such crimes, and providing for their punishment, will depend largely upon the action of such legislature, and those laws will not have the same force and effect in the territories as elsewhere within the United States. Whether the district courts of the territories are United States or territorial courts it is not necessary to determine for the purpose of this case. They are undoubtedly established by virtue of laws of the United States. Whether the power to enact such laws is incident to the right to acquire territory, and hold it, or is in pursuance of the authority to make all needful rules and regulations respecting the territory belonging to the United States, it is not necessary to determine now. The judges are appointed by the president, by and with the advice and consent of the senate, and in like manner the marshal and prosecuting attorney are ap-

pointed. Their terms of office are fixed by federal laws, and they are paid by the United States. The district court of the territories, considered with respect to the authority by which they are established, must be regarded as United States courts. But they act as United States courts and as territorial courts. They act in two capacities. When engaged in the trial of cases under the laws of the United States they are acting as United States courts, and when engaged in the trial of cases that would be tried in the state courts, were the territory a state, they act as territorial courts. The true position to take undoubtedly is that, when engaged in the trial of cases under the laws of the United States, they possess all the powers, the same jurisdiction, as circuit and district courts of the United States when so engaged."

In the case of Wayman vs. Southard, 10 Wheat. 1, Chief Justice Marshall was discussing the construction to be placed upon the 14th section of the judiciary act of 1789, which is virtually section 716 of the Revised Statutes, referring to certain powers granted to the various courts of the United States. It reads as follows:

"That all the before-mentioned courts of the United States shall have power to issue writs of *scire facias, habeas corpus,* and all other writs not specially provided by statute, which may be *necessary for the exercise of their respective jurisdictions* and agreeable to the principles and usages of law."

The Chief Justice said:

> "The words of the 14th are understood by the court to comprehend executions. An execution is a writ, which is certainly 'agreeable to the principles and usages of law.' There is no reason for supposing that the general term 'writs,' is restrained by the words, 'which may be necessary for the exercise of their respective jurisdictions,' to original process, or to process anterior to judgments. The jurisdiction of a court is not exhausted by the rendition of its judgment, but continues until that judgment shall be satisfied. Many questions arise on the process subsequent to the judgment, in which jurisdiction is to be exercised. It is, therefore, no unreasonable extension of the words of the act, to suppose an execution necessary for the exercise of jurisdiction. Were it even true, that jurisdiction could technically be said to terminate with the judgment, an execution would be a writ necessary for the perfection of that which was previously done; and would, consequently, be necessary to the beneficial exercise of jurisdiction."

And we contend that in cases brought under federal laws in the District Court of Alaska it is "necessary to the beneficial exercise of jurisdiction" of the District and Circuit Courts of the United States that the court of Alaska pursue and use the same procedure which the courts of the United States use in such cases. As is already implied in the words of Chief Justice Marshall, "exercise of jurisdiction" of

necessity connotes the employment of the means or proceedings usually and naturally employed when such jurisdiction is exercised. In federal cases this is the federal procedure.

III.

THE ALASKA CODE OF CRIMINAL PROCEDURE CANNOT IN ITS ENTIRETY APPLY TO FEDERAL CASES.

Aside from the language of section 1, which expressly confines the operation of the code of territorial cases, there are numerous provisions in the local code which show that Congress could not have intended it to in any way supersede the federal practice in the prosecution of infractions of the national law. Take, for instance, chapter 39, prescribing proceedings in cases of extradition. It is copied *in toto* from the Oregon code, and provides, in substance and effect, that fugitives from Alaska may be brought back upon request from the Government of Alaska to the Chief Executive of the State in which the fugitive may be found, and that a fugitive from a State who is found in Alaska may be taken away by order of the Governor of Alaska upon request from the Governor of the State where the fugitive is wanted. If any part whatever of the Alaska Code applies to federal offenders, this part certainly does, for its language is as broad as the language of any other section or chapter. And in such event chapter 39 must be construed to supersede section 1014, R. S., which latter furnishes the remedy for the apprehension of federal offenders who have fled from one State to

another. But is such application of chapter 39 possible? Let us see. If chapter 39 of the Alaska Code supersedes the federal practice provided by section 1014, R. S., a person who has in some State of the Union violated some federal penal law and fled to Alaska can be returned to the State whence he fled only upon application by the federal authorities of that State to the Governor of the State, who in response to such application will have to issue a requisition upon the Governor of Alaska. But the Governor of the State in question will certainly answer that he has no jurisdiction over federal offenders, and if he should refuse to issue the requisition, no Court could compel him to do so. This would place the federal Government at the mercy of the State government in prosecutions to maintain the authority of the federal law. The same situation would arise should the Governor of Alaska issue a requisition upon the Governor of some State for the return of a fugitive for violation of a federal law in Alaska. The Governor of the State would still be without jurisdiction, and at any rate the federal Government would be dependent upon State authorities for the enforcement of its own laws. The mere statement of the proposition discloses its absurdity.

Article IV, section 2, of the Constitution of the United States provides:

> "A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall on demand of the executive authority of the State

> from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime."

But this provision has been expressly held not to apply to persons committing crimes within one District of the United States and fleeing to another District of the United States; the constitutional provision extends only to persons committing offenses against one State and fleeing to another State.

In United States vs. Haskins, 26 Fed. Cas. No. 15, 322, in which the question was under consideration as to whether where a person has committed an offense against the laws of the United States in the Territory of Utah and fled to the State of California he can be extradited under the provisions of section 1014 of the Revised Statutes, the Court said:

> "I conclude, then, that an offender, after indictment found in one district, may, under this section, be arrested and imprisoned or bailed, as the case may be, for trial in any other district the courts of which have cognizance of the offense. This view is strengthened by the consideration that it is, if not certain, at least extremely probable, there is no other mode by which the defendant can be removed. The act of Congress, respecting fugitives from justice (1 Stat. 302), in pursuance of Article IV, s. 2, Const. U. S., provides a mode by which offenders against state and territorial laws, who have fled from justice, may be delivered up to the authorities of the state or territory demanding them,

> but makes no provision for the case of those persons who have committed offenses against the United States in one district and have fled to another. If the defendant cannot be reached under this act, and in my judgment he cannot, there remains but one other course possible besides the one adopted in the case now under consideration, that is, for the judge of the district where the indictment was found to issue his warrant to the marshal of this district, where the defendant now is."

In the light of this and other authorities it is clear that section 393 of Title II of our code does not extend to or apply in the case of an offense against the federal laws. That section reads as follows:

> "That whenever a person charged with treason or other felony, in said district shall flee from justice the governor of said district may appoint an agent to demand such fugitive of the executive authority of any State or Territory of the United States in which he may be found."

This section is adopted from the Oregon laws, and clearly, in view of the constitutional provision under which it is framed and in view of the decisions on the question, applies only to fugitives charged with offenses against the local laws of Alaska and not to fugitives charged with offenses against the laws of the United States as a nation.

In the case of United States vs. Haskins, *supra,* it was expressly decided that the provisions of section 1014 (which is section 33 of the judiciary act of 1789) are to be followed where defendants accused

of offenses against the federal laws are to be brought from one district into another to answer to the accusation—and that this is true where the accusation is made not in a State but in a territory having a court which is not strictly a federal court but is a territorial court exercising the jurisdiction of Circuit and District Courts of the United States. The Court said:

> "The question for determination is, whether the provisions of the thirty-third section of the judiciary act, touching the arrest and removal of offenders against the United States, must be limited in their operation to cases arising in those districts which embrace a state or some portion thereof? And the answer must be in the affirmative if the words 'district in which the trial is to be had,' in the third clause of that section, refer only to districts established or organized under that act. The act of 1789 divided the United States into thirteen districts. Since that time, as states have been admitted new districts have been organized, and so far as I can ascertain it has never been questioned that the general provisions of the judiciary act applied to the new districts without any express enactment of them for such districts; although by a narrow construction of the language it might be held to apply only to those courts and districts organized, and to which cognizance of crimes is given, by that act. The provision is that if the commitment of an offender is in a district other than that in which the offense is

to be tried, the judge shall issue his warrant for the removal of the offender to the district in which the trial is to be had. If, then, an offense against the United States may be tried in a district of Utah territory, there is nothing in the language of this provision necessarily forbidding a construction which will justify the removal of an offender there for trial. The organic act of Utah does extend the constitution and laws of the United States over the territory so far as the same may be applicable. It also makes provision for the organization of three district courts therein, and further provides 'that each of the said district courts shall have and exercise the same jurisdiction in all cases arising under the constitution and laws of the United States as is vested in the circuit and district courts of the United States.' Thus these courts have cognizance of all offenses committed in their respective districts, and as such an offense can only be tried in the district where it is committed, the offender, if he escapes from the territory, must go unpunished, unless he can be removed there for trial; and this only can be done under and by virtue of the provisions of the judiciary act. No other provision of law for such a case can be found, and it does not seem probable that Congress has left it wholly unprovided for. For, if it is doubtful that the warrant of a district judge of the United States can be executed out of his district, it is certain that the

> warrant of a territorial judge cannot run out of his territory."

And subsequently in the opinion the court says:

> "Now, the provisions of section 33 are of universal application, and are plainly intended to cover every offense against the United States, committed within the jurisdiction of any of its courts."

And the Court holds that the District Court of Utah is for these purposes a United States court. To use the language of the opinion:

> "The plain intention is to provide for any and every offense against the United States. The crime charged in this case is such an offense and is triable before the district court of the third judicial district of Utah. While the district courts of Utah are neither state courts nor United States courts in the sense of the constitution, they are still courts established and organized under the authority of the United States, sitting in a territory belonging to the United States and exercising their jurisdiction conferred upon them by that government. The whole territory is under the plenary control of the general government, and the districts, while they are territorial districts, are still districts within which certain offenses against the United States must be tried if tried at all."

In this connection it is to be observed that section 393 of Title II of our Criminal Code is couched in language broad enough to cover these cases if the contention of the plaintiff in error is correct that

the code procedure applies to them. But not only do authority and reason indicate that the chapter in relation to fugitives from justice in our code does not apply to these cases, but its application thereto or to similar cases would lead to the most absurd and impossible consequences. For it is clear that throughout the Union there are two sovereign powers,—the federal sovereign and the State sovereign. It is equally clear that one governor cannot appeal to another for the arrest of a person charged with an offense against the laws of the United States committed within the territorial jurisdiction of the former, and it is likewise apparent that if such an appeal were made the latter Governor would have no authority to act upon it; for if the opposite conclusions could be entertained, in order to secure a due and proper enforcement of the federal laws it might be necessary for the federal sovereign to request one State sovereign to apply to another State sovereign for the extradition of persons accused of crimes against the federal sovereign. The inevitable result would be the debasement of the federal sovereign to a position of dependency upon the States, i. e., the overturning of our whole theory and system of government, which postulate the unquestioned and unquestionable supremacy of the federal sovereign in its own sphere of action. If the one State sovereign or the other should refuse to honor the request or be recalcitrant, the federal sovereign would be impotent and paralyzed. The natural and inevitable conclusion is that chapter 39 of our code, in spite of its broad general language, must be real in light of

the express restrictions as to its application set out in section 1 of Title II as well as in prior sections.

Now, it is clear that if section 1014 of the Revised Statutes applies to Alaska, so must sections 1015, 1016, 1018, 1019, 1020 and 1029, all of which relate in one manner or another to the proceeding described and provided in section 1014.

IV.

CERTAIN PROVISIONS OF THE ALASKA CODE OF CRIMINAL PROCEDURE, IF APPLICABLE TO SUCH CASES AS THESE, WOULD DESTROY THE UNIFORMITY OF ADMINISTRATION AND ENFORCEMENT OF THE FEDERAL PENAL LAWS.

One portion of our code which would obviously militate against uniformity of enforcement of the federal penal laws if it were held applicable to offenses against such laws, is section 481 of Title II of the Criminal Code. It is as follows:

> "That in any case where a conviction occurs, except in a case of murder or rape, the court may, when in its opinion the facts and circumstances are such as to make the minimum penalty provided in this act manifestly too severe, impose a less penalty, either of fine or imprisonment or both: Provided, That in any such case the court shall cause the reasons for its action to be set forth at large on the record in the case."

Federal statutes defining and providing for the punishment of crimes set forth explicitly the limits

within which the sentence may range. Clearly, if the Court, under the authority of this code provision, can affix a penalty less than the minimum prescribed by the federal laws, uniformity cannot longer be claimed for the federal penal laws. This result in itself indicates the positive intention on the part of Congress that section 481 should not apply in federal cases.

Still another section which would induce confusion and uncertainty and would likewise destroy the uniformity of operation of the federal criminal laws is section 192 of Title I, which is as follows:

> "That if any person attempts to commit any crime, and in such attempt does any act toward the commission of such crime, but fails, or is prevented or intercepted in the perpetration thereof, such person, when no other provision is made by law for the punishment of such attempt, upon conviction thereof, shall be punished by not to exceed one-half the maximum punishment provided by statute for the offense itself."

We may use the anti-trust law as an illustration. Section 3 of that act makes the entering into any contract, combination or conspiracy in restraint of trade a misdemeanor punishable by a fine not exceeding $5,000 or by imprisonment not exceeding one year or both. Now, if the proofs against defendants charged with a violation of said section 3 of the Anti-Trust Act should disclose that they had not entered into such combination in restraint of trade

but had attempted to do so, they would be punishable, if the contention of plaintiff in error be correct, under section 192 of Title II for making such attempt. The extent of the punishment which, under that section, could be inflicted by the court in case the jury found the defendants guilty of such an attempt is one-half that which is prescribed for the completed offense by section 3 of the Anti-Trust Act.

Clearly, this would create a great number of crimes under the federal laws which are not made such by the federal laws themselves and would destroy the uniform operation of such laws throughout the country. For there are scores of federal statutes applicable in Alaska which define crimes but do not make the attempt to commit such crimes punishable. The federal Code of Procedure makes an attempt to commit a crime punishable only when the attempt is itself specifically made criminal. Section 1035 of the Revised Statutes, which relates to this subject, is as follows:

> "In all criminal causes the defendant may be found guilty of any offense the commission of which is necessarily included in that with which he is charged in the indictment, or may be found guilty of an attempt to commit the offense so charged: *Provided,* That such attempt be itself a separate offense."

Now, if our Code of Procedure is to be followed in the prosecution of such offenses, then we have a long list of crimes added to the federal Penal Code as far as its enforcement in Alaska is concerned, namely, the

crimes of attempting to commit the various substantive crimes defined in the federal laws. It is clear that Congress did not intend that laws of a national character should have such an unusual and extraordinary operation in the Territory of Alaska or in any State or territory; a construction which would so result should, if possible, be avoided, for it is clearly a construction violative of both federal law and the spirit of our institutions. In the interpretation of statutes presumptions are indulged against absurd consequences.

36 Cyc. 1136 (5)

Dekelt vs. People, 99 Pac. (Colo.) 330.

In re King, 75 N. W. (Iowa), 187.

If section 2 of the Anti-Trust Act were applicable to Alaska, then if a defendant prosecuted thereunder were found guilty of an attempt to monopolize, the provisions thereof relating to punishment would be in direct conflict with said section 192 of Title II of the Alaska Code, for the latter section would provide that the punishment shall be one-half that which is provided by the second section of the Anti-Trust Act. Which penalty would the Court impose, the one provided by the section which defines the offense or the one provided by section 192 of our code? Whichever horn of the dilemma the Court chose, it would be necessary that one provision or the other be not only ignored but violated.

Again: Many crimes denounced by the federal statute are by the same statute designated as misdemeanors and should be prosecuted as such, while if the Alaska Code applied to them, they must in this

territory be treated as felonies and be prosecuted as such. Hence, if counsel's theory were correct, the offender against such law would in the States be merely a wrongdoer while in Alaska he would be a felon.

These illustrations might be greatly multiplied, but we shall add only one more:

Section 190, Part II, of the Alaska Code provides:

> "That a judgment that the defendant pay a fine must also direct that he be imprisoned in the county jail until the fine be satisfied, specifying the extent of the imprisonment, which cannot exceed one day for every two dollars of the fine; and in case the entry of judgment should omit to direct the imprisonment and the extent thereof, the judgment to pay the fine shall operate to authorize and require the imprisonment of the defendant until the fine is satisfied at the rate above mentioned."

Does this apply to federal offenses? If so, it supersedes section 1042, R. S., as well as section 5296, R. S. This would, for a multitude of reasons too obvious to need repeating, seem impossible.

Yet, the language of section 190 standing alone, is all-embracing, and sweeps section 1042, R. S., out of the way, unless the former is construed as limited by the language of section 1, Part II.

To hold that the Alaska Practice Code applies in federal cases would inevitably involve us in interminable trouble and confusion,—a result which should not be construed as contemplated by Congress.

V.

CERTAIN PROVISIONS OF THE FEDERAL LAWS INDICATE THAT THEY MUST BE APPLICABLE TO THESE CASES.

Aside from the language of the local code, there are numerous sections of the Revised Statutes whose unmistakable import is that the federal procedure must be applied in federal cases in the Alaska courts, which disclose the reasons, in part at least, why Congress carefully limited the general language of the various sections of the Alaska Code by the explicit limitations imposed by section 1.

Other sections of the Revised Statutes applicable are 921, 977, 980 and 982, which are as follows:

> "Sec. 921. When causes of a like nature or relative to the same subject are pending before a court of the United States, or of any Territory, the court may make such orders and rules concerning proceedings therein as may be conformable to the usages of courts for avoiding unnecessary costs or delay in the administration of justice, and may consolidate said causes when it appears reasonable to do so."

> "Sec. 977. If several actions or processes are instituted, in a court of the United States or one of the Territories, against persons who might legally be joined in one action or process touching the matter in dispute, the party pursuing the same shall not recover, on all of the judgments therein which may be rendered in his favor, the costs of more than one action or process, unless special cause for said several actions or processes

is satisfactorily shown on motion in open court."

"Sec. 980. When a district attorney prosecutes two or more indictments, suits, or proceedings which should be joined, he shall be paid but one bill of costs for all of them."

"Sec. 982. If any attorney, proctor, or other person admitted to conduct causes in any court of the United States, or of any Territory, appears to have multiplied the proceedings in any cause before such court, so as to increase costs unreasonably and vexatiously, he shall be required, by order of the court, to satisfy any excess of costs so increased."

These sections will hereafter be referred to in chapters XI, XII of this brief, but at this point the Court's attention is called to the fact that these sections together with 1024 were enacted partly for the purpose of depriving the court officers of the opportunity of unnecessarily increasing their own fees. As the fee system of remunerating United States attorneys, marshals and clerks was extended to Alaska by section 9 of the Act of May 17, 1884, it must be conclusively presumed that all these sections, including 1024, by which the legality of these fees must be measured, are also applicable.

We think it appears from section 1910 that Congress contemplated that the procedure in federal criminal cases should be that prescribed by the federal laws, for by that section not only are the territorial courts given authority to try such cases, but they are required to set aside a separate portion of

the term therefor. Section 1910 of the Revised Statutes is as follows:

> "Each of the district courts in the Territories mentioned in the preceding section [namely, New Mexico, Utah, Colorado, Dakota, Arizona, Idaho, Montana, and Wyoming—(all of the Territories which were then known and called such at the time of the enactment of this law)] shall have and exercise the same jurisdiction, in all cases arising under the Constitution and laws of the United States, as is vested in the circuit and district courts of the United States; and the first six days of every term of the respective district courts, or so much thereof as is necessary, shall be appropriated to the trial of causes arising under such Constitution and laws; but writs of error and appeals in all such cases may be had to the supreme court of each Territory, as in other cases."

One provision of the Revised Statutes which must be applicable in Alaska if the laws of the nation are to be uniformly administered and enforced throughout the territorial limits of the United States, is section 1033 of the Revised Statutes, relating to the furnishing of lists of jurors and witnesses to a person accused of treason or other capital offense under the federal laws. But if the code of Alaska is the sole Code of Procedure in trials of crimes against the federal laws, then section 1033 cannot be resorted to.

VI.

THE APPLICATION OF LOCAL PROCEDURE TO CASES WHERE FEDERAL CRIMES ARE CHARGED WOULD LEAD TO CONFLICTS OF AUTHORITY AND WOULD CRIPPLE THE FEDERAL SOVEREIGN.

Another argument which undoubtedly induced Congress to limit the use of the local procedure besides that drawn from the inconsistency inherent in the application of a local Code of Procedure to a federal code of crimes, is the argument presented by the conflicts of authority to which such a course of proceeding would inevitably lead. The case of United States vs. Reid, 12 How. 360, was a joint indictment for murder against Reid and Clements, and by permission of the Court they were separately tried, and upon the trial of Reid he proposed to call Clements as a witness on his behalf under a statute of Virginia adopted in 1849. This statute would have rendered Clements competent could it have been applied to cases under the laws of the United States. The thirty-fourth section of the act of Congress of 1789 (which is section 721 of the Revised Statutes) declared that "the laws of the several States, except where the constitution, treaties, or statutes of the United States shall otherwise require to provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply." The case came before the Supreme Court upon a certificate of division between the judges of the Circuit Court. In deciding the

point the Court said, by Chief Justice Taney:

> "But it could not be supposed, without very plain words to show it, that Congress intended to give to the states the power of prescribing the rules of evidence in trials for offenses against the United States. For this construction would in effect place the criminal jurisprudence of one sovereignty under the control of another. It is evident that such could not be the design of this act of Congress, and that the statute of Virginia was not the law by which the admissibility of Clements as a witness ought to have been decided." (p. 362.)

As Chief Justice Zane, of the Supreme Court of the Territory of Utah, says, in commenting on this case in his opinion in United States vs. Jones, *supra:*

> "The 'rules of evidence' referred to in the above quotation are to be applied in trials of offenses against the United States, whether in a district, a circuit court, or in a territorial court, in whatever court the trial might be had. The objection was to a state legislature prescribing rules to be used in the trial of offenses against the United States. If the territorial legislature may enact rules of evidence and practice to govern in the trial of offenders against the laws of the United States the criminal jurisprudence of the federal government is thereby placed under the control of a territory." (p. 237.)

If it be said that in Alaska there is but one sovereign—the United States—yet the practical difficulties

and incongruities would be as great here as they would be in a State if the local rules of procedure are to apply in federal cases. This is manifestly so because the code of Oregon, in substance, has been adopted as the code of Alaska. And the fact that the adoption of the code of Oregon was an act of Congress does not alter the situation so far as such incongruities and difficulties are concerned.

VII.

THE COURSE OF CONGRESSIONAL LEGISLATION AND THE DECISIONS THEREUNDER FULLY PROVE THAT CONGRESS COULD NOT HAVE INTENDED THAT LOCAL PROCEDURE BE APPLIED TO FEDERAL OFFENDERS.

Following the "rule of reason" that federal procedure be used in prosecutions for federal offenses, acts of Congress and the decisions dictate the same course. From the beginning of our Government Congress has in its various enactments relating to procedure in criminal cases in the federal courts manifested a steady and continuing determination to prevent the application to such cases of the procedure of the States. No doubt this policy on the part of Congress flows from the unreasonableness of applying to a system of laws which is intended to be uniform throughout the United States the varying and different codes of criminal procedure which are to be found in the several States. It cannot be affirmed that this policy is not intentional, for Congress has enacted laws making the procedure and even the rules of decision of the States in common-law civil actions

applicable in the federal courts, and it has made specific provision for the general procedure to be followed in equity and admiralty cases. Section 914 of the Revised Statutes of the United States is as follows:

> "The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the circuit and district courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such circuit or district courts are held, any rule of court to the contrary notwithstanding."

Clearly, this does not apply to criminal cases.

United States vs. Gardner, 25 Fed. Cas. No. 15,187.

Section 721 of the Revised Statutes is as follows:

> "The laws of the several States except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

This section first became law in the original judiciary act of September 24, 1789, and has been the law in this country continuously since that time. As some of the courts have expressed it, there was no inherent reason why the expression "trials at common law" in this section should not apply to criminal trials as well as to common-law civil trials because certainly criminal actions are actions at common law. This section

originally stood between two sections clearly applicable to criminal cases, and yet it has been held that it does not apply to such cases. As was stated in United States vs. Reid, 12 How. 360:

> "It could not be supposed, without very plain words to show it, that Congress intended to give to the states the power of prescribing the rules of evidence in trials for offenses against the United States," nor the rules of decision either.

Section 858 of the Revised Statutes consists of parts of three different acts, one of which became law in 1862, another in 1864, and the third in 1865. The portions derived from the two latter acts relate to the competency of witnesses, and the portion derived from the law of 1862 is as follows:

> "In all other respects, the laws of the State in which the court is held shall be the rules of decision as to the competency of witnesses in the courts of the United States in trials at common law, and in equity and admiralty."

Here again the expression "in trials at common law" could have included all criminal trials under the penal statutes of the United States as far as the mere form and usual meaning of the words are concerned. But the plain intent and purpose of Congress not to apply these and similar sections to criminal trials was so evident to the courts that the latter have uniformly held that this provision, like others expressed in similar language, does not apply to such criminal trials.

For instance: The case of United States vs. Brown, 1 Saw. 531, Fed. Cas. No. 14,671, in the United States

District Court for the District of Oregon, and decided by Judge Deady in 1871, was upon an indictment under a federal law for corruptly impeding the due administration of justice in a United States court. The counsel for the defendants, namely, W. W. Thayer and L. Lair Hill, contended that under the acts of Congress assimilating federal procedure to state procedure the provisions of the Oregon code touching the competency of witnesses in criminal cases were applicable and governed the action. After quoting the language of Chief Justice Taney in United States vs. Reid, *supra,* Judge Deady held that the Oregon code provisions did not apply, because the case was a criminal case and those acts of Congress could not have been intended to cover and apply to such cases.

And in Logan vs. United States, 144 U. S. 263, 302, it was specifically held that the portion of section 858 taken from the law of 1862 "has no application to criminal trials."

In United States vs. Black, 1 Hask. 570, Fed. Cas. No. 14,602, the Court, referring to the provision now under consideration, said:

> "It was held in this circuit, by Mr. Justice Clifford, soon after the passage of these acts, that the law was not thereby changed as to the competency of defendants as witnesses in criminal causes, and they have never been received as witnesses; and this view was sanctioned by the supreme court of the United States, in Green vs. U. S., 9 Wall. 655. It is also well understood, that the attempt has been repeatedly made, but

> without success, to induce congress to modify the law in this behalf, and allow persons under indictment to be examined as witnesses on the trial."

Other provisions of the Revised Statutes, such as those incorporated in sections 914, 915 and 916, assimilate the practice and procedure in common-law actions in the federal courts to the practice of the State in which the federal courts happen to be sitting. But such sections, wherever there has been any doubt expressed by counsel on the subject, have been held not to apply to criminal cases.

U. S. vs. Gardner, 25 Fed. Cas. No. 15,187.

As we have already stated, this policy to exclude the State's criminal procedure from all cases of a criminal nature arising under the laws of the United States and in the United States courts has been uniform and consistent, both on the part of Congress and on that of the federal courts. As was said by Mr. Justice Miller in United States vs. Hawthorne, 1 Dill. 422, 26 Fed. Cas. No. 15,332, which was upon an indictment under the federal law for having possession of counterfeit Treasury notes with intent to utter them:

> "Crimes against the United States are wholly withdrawn from the domain of state legislation. They are created solely by congress, and congress has provided for their prosecution *and the mode of procedure.*"

The reason why Congress assimilated the practice in common-law actions of a civil nature to the prac-

tice of the States and refused to adopt the State's procedure in criminal actions, is clear. In the former class of actions property rights of one kind or another are involved, while in the latter class the question presented is always whether a certain state of facts constitutes an offense against the people of the United States at large. To determine the property rights it is necessary to have recourse not only to the modes of procedure, but to the statutes defining those rights to be found in the laws of the State where the property is located. But to determine the question whether a certain state of facts constitutes an offense against the United States, it is not necessary or proper or reasonable to have recourse to State laws. There the sole question is whether the federal law makes the facts an offense, and the only way of arriving at the same conclusion and to impose the same penalties in Massachusetts as in California, in Alaska as in Florida, is to apply the same substantive rules and modes of procedure.

In enacting that in common-law civil actions resort shall be had, so far as may be, to the states' laws for the procedure, Congress has simply applied the principle upon which we insist, namely, "the remedy follows the right."

It is argued that the provision in the Edmunds act authorizing the joinder of several counts in the same indictment for violation of the provisions of that act is at variance with the foregoing theory, and is proof that Congress considered section 1024 inapplicable to the territories. Such deduction is unwarranted. Section 3 of the Edmunds act provides:

"Counts for *any* or *all* of the offenses named in the two sections last preceding may be joined in the same information or indictment."

An inspection of the "two preceding sections" will readily disclose the fact that not even under section 1024, R. S., could counts for all the offenses be joined, for the two sections of the Edmunds act denounce offenses of various grades as well as of various classes, felonies as well as misdemeanors, and are not always necessarily connected together. Such could not be united either at common law or under section 1024.

1 Bish. Cr. Pr. § 445.

U. S. v. Scott, 74 Fed. 213.

To make it certain, therefore, that any and all offenses which could be charged under this law could be joined in one indictment, even where section 1024 applied, section 3 of this act became necessary.

But in addition to this consideration it should be borne in mind that the Edmunds Law, though enacted by Congress, is not a federal law, not being enacted by that body exercising its federal jurisdiction, but is a local or territorial law enacted by Congress acting as a territorial legislature, and for that reason the local practice of the territories would apply to its enforcement.

In the New Federal Penal Code the Edmunds Law is adopted *verbatim,* and this circumstance affords counsel the excuse for saying that that compilation contains provision for joinder of some offenses, but not for the one here charged, and that therefore

it must be presumed it was not intended they could be so joined.

In this connection it may be noted that section 5209, R. S., the one under which this indictment is drawn, is not contained in the New Penal Code, for the very reason that it is a part of an administrative federal law, viz., the national banking laws, and the New Penal Code has no more to do with it than with the other administrative laws, such as the revenue laws, the customs laws, the transportation laws, the pure food law or the Sherman law, no part of either of which is adopted into the new codification.

It is also argued that Senator Carter and Mr. Paul Charlton, in their respective compilations of the Alaska laws, one known as the Carter Code and the other as Senate Doc. No. 142—1906—made no reference to the federal practice provisions, and that this omission on their part is evidence that these authorities considered these laws not applicable to Alaska, on the theory that they intended to embody all such laws in their respective compilations.

But it should be carefully noted that these compilations contain no laws except such as are of a local or territorial nature; no law of a purely federal nature is to be found therein. From this circumstance the deduction cannot be made, however, that those learned compilers thought that no general federal law applied. On the other hand, it may be fairly concluded that they realized that the general federal laws applied in Alaska with the same force and effect as in the States and the Territories, but that they constituted an entirely separate and distinct sys-

tem of laws enacted by virtue of other and different powers than those exercised by Congress in legislating for the separate localities. In other words, the compilers kept clearly in mind the distinction between the jurisdiction of Congress acting as a federal legislature and the jurisdiction of Congress acting under the powers conferred by the Constitution to exercise plenary power over the territories.

VIII.

THE GENERAL EXTENSION OF THE FEDERAL LAWS OF THE UNITED STATES TO ALASKA MAKES THE FEDERAL PROCEDURE AND NO OTHER APPLICABLE IN THE PENDING CASE.

It is our view that the general laws of the United States have been extended to Alaska, so far as they are applicable, and that the laws of procedure in criminal cases are as much laws of the United States as are laws defining crimes. In section 7 of the Act which provided civil government for Alaska (Act of May 17, 1884, 23 Stat. 24), it is said:

> "That the general laws of the State of Oregon now in force are hereby declared to be the law in said district, so far as the same may be applicable and not in conflict with the provisions of this act *of the laws of the United States.*"

And in section 9 it is said:

> "That all officers appointed for said district, before entering upon the duties of their offices, shall take the oaths required by law, *and the laws of the United States, not locally inapplicable to*

said district and not inconsistent with the provisions of this act are hereby extended thereto."

And section 11 is as follows:

> "That the Attorney-General is directed forthwith to compile and cause to be printed, in the English language, in pamphlet form, so much of the general laws of the United States as is applicable to the duties of the governor, attorney, judge, clerk, marshals, and commissioners appointed for said district, and shall furnish for the use of the officers of said Territory so many copies as may be needed of the laws of Oregon applicable to said district."

That Congress thought and believed that the laws of the United States, unless inapplicable, extended to Alaska, under the provisions of the said act of May 17, 1884, is further evidenced by the language in section 8 of that act expressly providing that the land laws of the United States should not be operative in Alaska. That language is as follows:

> "But nothing contained in this act shall be construed to put in force in said district the general land laws of the United States."

And the result has been that when Congress has wished to extend any portion of the land laws of the United States to Alaska, it has done so by specific enactment.

These various provisions are in full accord with section 1891 of the Revised Statutes of the United States, which in the case of Nagle vs. United States,

191 Fed. 141, has been held to apply in its full force and extent to Alaska.

Section 1891 of the Revised Statutes is as follows:

> "The Constitution and *all* laws of the United States which are not locally inapplicable shall have the same force and effect within all the organized Territories, and in every Territory hereafter organized, as elsewhere within the United States."

The decision in the Nagle case depended on whether that section extended to and applied in Alaska, so as to make operative here a certain federal statute relating to Indian citizenship. Or as the Court expresses it:

> "In this relation, it is urged that the provision contained in section 6 [of the law relating to Indian citizenship] . . . . operates to make Indians in Alaska who observe the behests of the provisions citizens, as well as Indians who reside elsewhere in the United States." (p. 143.)

The Court proceeds:

> "Whether this be so we think must depend upon whether the laws of Congress of general application have been extended to or are effective upon any constitutional or legal principle within the territorial confines of Alaska. We are of the view that the question must be answered in the affirmative."

The court arrived at that decision because it considered that said section 1891 of the Revised Stat-

utes does extend all general statutes of the United States to Alaska and makes them applicable therein. That section does not say that all *substantive* laws shall have effect in the organized territories, but that *all* laws shall.

Long before the Nagle decision was handed down Congress evinced the belief that the general laws of the United States were applicable in Alaska, for in passing the legislative, executive and judicial appropriations act in 1896 (Act of May, 28, 1896, c. 252, 29 Stat. 140), sections six to twenty-three of that act are by express provision declared not to apply to Alaska. There was no reason for inserting such a provision except the full realization by Congress that, under the general rule laid down in section 1891 of the Revised Statutes, those sections would apply to Alaska unless otherwise expressly provided.

Now, what reason, in view of these various provisions and of the decision in the Nagle case and the Humboldt case, can there be for saying that though "All laws of the United States" (to use the exact language of § 1891) are extended to Alaska, this expression means only the substantive laws and excludes the laws of procedure provided for the courts authorized to maintain the federal authority. Are not these laws or procedure as much "laws of the United States" as the substantive laws? If they are not laws of the United States, what are they?

Page vs. Burnstine.

This question is settled by the decision of the Supreme Court in Page vs. Burnstine, 102 U. S. 664, heretofore referred to. In this case it was held that

the general federal laws of procedure applied to the District of Columbia, though Congress had already provided separate courts and separate code of laws for that District. The legal status of Alaska is precisely the same as that of the District of Columbia. Congress is the sole legislative body for each. Each has been provided with a separate judiciary and a separate system of laws, and to each have the general laws been extended by identical language used in two different sections. The reasons, therefore, which impelled the Supreme Court to apply the general laws of practice to the courts of the District of Columbia must perforce lead this tribunal to the same conclusion with reference to the District of Alaska. The Page case is so conclusive on this subject that we deem it justifiable to quote from it at some length.

Referring to the question of whether or not a certain general practice provision enacted by Congress for the United States courts applied to the District of Columbia, the Court said:

> "There is still another act bearing upon the question before us. We allude to that portion of sec. 34 of the act of Feb. 21, 1871, creating a government for the District of Columbia, which declares that 'the Constitution, and all the laws of the United States which are not locally inapplicable, shall have the same force and effect within the said District of Columbia as elsewhere within the United States.' . . . . If it be true, as argued, that the Supreme Court of the District of Columbia, although organized

under and by authority of the United States, and possessing the same powers and jurisdiction as the circuit courts of the United States, was not intended to be embraced by the proviso to the third section of the appropriation act of July 2, 1864, and if, as may be further argued, the act of March 3, 1865, being, in terms amendatory only of that section, was not intended to modify the special act of the latter date relating to this District, it is, nevertheless, quite clear that, from and after the passage of the act of Feb. 21, 1871, if not before, the act of March 3, 1865, became a part of the law of evidence in this District. *The legal effect of the declaration that all the laws of the United States, not locally inapplicable, should have the same force and effect within this District as elsewhere within the United States, was to import into, or add to, the special act of July 2, 1864, relating to the law of evidence in the District, the exception, created by the act of March 3, 1865, to the general statutory rule, excluding parties as witnesses. This is manifestly so, unless it be that the statute affecting the competency of parties as witnesses in actions by or against personal representatives or guardians, in which judgment may be rendered for or against them, is 'locally inapplicable' to this District. But such a position cannot be maintained consistently with sound reason.* The same considerations of public policy which would require the enforcement of such a statute, as that of March 3, 1865, in the Circuit

and District Courts of the United States, without regard to the laws of the respective States on the same subject, would suggest its application in the administration of justice in the courts of this District." (p. 666.)

The Court then proceeded to discuss and distinguish the cases cited and relied upon by plaintiff in error in the case at bar:

IX.

THE AUTHORITIES OF PLAINTIFF IN ERROR ANALYZED.

Plaintiff in error has submitted a number of authorities which at first blush might seem to support his contentions, but upon examination it will be found that the situations passed upon by the Courts in those cases are entirely different from the situation in the case at bar.

1. All the cases cited by plaintiff in error were decided under territorial statutes entirely different from ours, viz.:

a. The Alaska Code provides, in express language as well as by implication arising from its various provisions, that it shall apply only to local or territorial crimes, and in that respect differs from the statutes under which those authorities were decided.

b. The Act creating the District Court of Alaska (March 3, 1909) confers broader jurisdiction than the Acts creating the territorial courts.

c. The old territories were given a measure of home rule and are *quasi* independent sovereigns

with a legislature authorized by Congress to enact not only substantive laws but also rules of practice for the courts.

The first two of these propositions have already been discussed. The last is discussed in the leading cases of Clinton vs. Englebrecht (13 Wall. 434), and Hornbuckle vs. Toombs, 18 Wall. 648, and the right of the territorial legislature to prescribe rules of practice is given as the reason for holding that local practice applied. This distinction between the political statute of a territory, with a local legislature, and a district without one, is noted and emphasized by the Supreme Court in Page vs. Burnstine, and the inapplicability to the courts in a district of the doctrine announced by the authorities of plaintiff in error is clearly pointed out in the following language:

> "*Those decisions, it will be seen, proceeded upon the ground, mainly, that the legislatures of the Territories referred to, in the exercise of power expressly conferred by Congress, had enacted laws covering the same subjects as those to which the General Statutes of the United States referred. It was, therefore, ruled that the territorial enactments, regulating the practice and proceedings of territorial courts, were not displaced or superseded by general statutes upon the same subject passed by Congress, in reference to 'courts of the United States.' . . . No such state of case exists here. The reasons assigned for the conclusion reached in those cases have no application to the question before us.*" (p. 668.)

On this score there can be no possible distinction between the District of Columbia and the District of Alaska. If the doctrine of Clinton vs. Englebrecht and Hornbuckle vs. Toombs does not apply to the District of Columbia, it cannot apply to Alaska while reason rules in the interpretation of law.

2. The authorities of plaintiff in error deal:

a. With private civil litigation or with local territorial crimes and not with national or federal crimes, and do not in any manner affect the federal sovereignty;

b. Or with the organization of the tribunal, such as the selecting, summoning or impanelling of juries —an authority conferred upon a local territorial government—not with the remedy for the national wrong.

The only case on record from the territories where a national crime was involved is Folsom vs. United States, *supra,* and in that case it was held that section 1024, R. S., the one here under discussion, did apply, and the reason assigned was that in trying the case, which involved the violation of a general federal law, the Court exercised the jurisdiction of a United States court.

The most recent case on the subject is Hunter vs. United States, 195 Fed. 253, decided by the Circuit Court of Appeals of the Eighth Circuit last March, in which it was held:

> "Revised Statutes, section 1020, which authorizes the court in a criminal case to remit the whole or any part of the penalty of a forfeited recognizance 'whenever it appears to the court

> that there has been no wilful default of the party, and that a trial can, notwithstanding, be had in the cause,' governs in a prosecution for an offense against the United States in a territorial court, to the exclusion of a statute of the Territory."

It is true that the opinion recites that "in the trial of cases territorial courts are required to conform to the statutes and practices of the territory," but this is purely a *dictum* and in no way involved in the decision of the controversy.

It is clear that all of the cases relied upon by counsel arose under local, not national, statutes. For though some of them arose under statutes applying to the territories generally, yet statutes of this kind have no other force or effect than they would possess if enacted as separate and distinct statutes for each and every territory severally. If the mode of enactment had been by several acts, each one applying to a several territory, it would not be contended that they would be national laws. Then why are they national laws if the form of enactment be one statute applying to all the territories? Can the mere enactment in compendious or universal form, instead of as several statutes, change the essential character of such statutes? We submit that it cannot. No law, it is submitted, is national, as contra-distinguished from local, in its character unless it is nation-wide in its extent and applicability and enacted by Congress in its capacity as a national legislature as contra-distinguished from its capacity as a territorial legislature.

This feature of the law was not examined into by Judge Lyons, for the reason that he considered the language of the local statute conclusive that it applied only to local offenses, and he, therefore, accepted counsel's statement as correct, that in the territories federal offenses were prosecuted under the rules of the local procedure. But this we have shown, and shall further emphasize, is not the ruling of the courts.

Let us analyze the cases cited by plaintiff in error.

In Clinton vs. Englebrecht it appears that an ordinance of the city of Salt Lake, in the territory of Utah, provided that retail liquor dealers must take out a license before selling liquor. The plaintiffs were such dealers and failed to take out the said license, whereupon the defendants, acting under the said ordinance, destroyed the stock of liquors of the plaintiffs. A statute, which clearly must have been a statute of the territory and not a statute of the United States as a national Government, gave a right of action against any person who should willfully and maliciously destroy the goods of another, and provided for the recovery of three times the value of the property destroyed. The plaintiffs sued the defendants for such threefold value of the liquors destroyed. In ordering the issuance of a venire for a jury the Court proceeded on the theory that it was acting in that case as a court of the United States, and that it was to be governed in the selection of jurors by the act of Congress; whereas the local territorial statutes provided a method of procedure for the impanelling of the jury which was different from

that provided by said acts of Congress. This action of the Court was alleged as error, and was held to be such on appeal. Obviously it was error. The case does not support the theory of the plaintiff in error in the case at bar that in federal crimes local procedure applies. Moreover, the question raised was as to the proper method of selecting and impanelling the jury, which does not relate to the remedy, but to the organization of the tribunal.

The action in Hornbuckle vs. Toombs was likewise under a local statute, and upon a cause of action essentially local, not federal, in its character. To quote from the statement of facts:

> "Toombs brought an action against Hornbuckle in a district court of the Territory of Montana, for damages caused by the diversion of a stream of water, by which his farm was deprived of irrigation, and for an adjudication of his right to the stream, and an injunction against further diversion. The action was framed and conducted in accordance with the practice as established by the legislative assembly of the Territory." (p. 650.)

The Practice Act adopted by the legislative assembly of the territory in 1867 contained the familiar provision, common to the Practice Acts of several of the states and territories, to the effect that there should be in the territory of Montana "but one form of civil action for the enforcement or protection of private rights and the redress or prevention of private wrongs." In behalf of Hornbuckle it was contended that the Court committed error in permitting

the joinder in one complaint of actions of an equitable and of a legal nature; Hornbuckle's counsel argued that the provisions of the practice code of the United States, adopted in 1792 (1 Stat. 276), controlled, and that therefore equitable and legal causes of action could not be joined in one complaint. The Supreme Court decided that the lower court committed no error in following the procedure prescribed by the territorial assembly. And Justice Bradley, who delivered the opinion of the Court, expressly stated that the Supreme Court did not, in the Hornbuckle case, decide what procedure should be adopted in causes arising in the territories under *national* statutes. At p. 656 he says:

> "It is true that the District Courts of the Territory are, by the organic act, invested with the same jurisdiction, in all cases arising under the Constitution and laws of the United States, as is vested in the Circuit and District Courts of the United States; and a portion of each term is directed to be appropriated to the trial of causes arising under the said Constitution and laws. Whether, when acting in this capacity, the said courts are to be governed by any of the regulations affecting the Circuit and District Courts of the United States, is not now the question. A large class of cases within the jurisdiction of the latter courts would not, under this clause, come in the Territorial courts; namely, those in which the jurisdiction depends on the citizenship of the parties. Cases arising under the Constitution and laws of the United States would be composed

mostly of revenue, admiralty, patent, and bankruptcy cases, *prosecutions for crimes against the United States,* and prosecutions and suits for infractions of the laws relating to civil rights under the fourteenth and fifteenth amendments. To avoid question and controversy as to the *modes of proceeding in such cases,* where not already settled by law, perhaps additional legislation would be desirable.''

Good vs. Martin, 95 U. S. 90, was a suit in the District Court of Arapahoe County, Colorado Territory, upon a promissory note—clearly an action under a local statute. The trial court refused to permit certain witnesses to testify because of their interest, and such refusal was alleged as error. The Supreme Court of the United States held that the proviso of the third section of the Act of Congress approved July 2, 1864 (13 Stat. 351), to the effect that in the courts of the United States no witness shall be excluded in any civil action because he is a party to, or interested in, the issue tried, has no application in an action arising under territorial laws. This case is not an authority for the contention of the plaintiff in error in the case at bar, because it simply amounts to a denial of the proposition that practice statutes of a federal character are applicable in local territorial actions.

In Reynolds vs. United States, 98 U. S. 145, the indictment was for bigamy, in violation of section 5352 of the Revised Statutes of the United States, which reads as follows:

"Every person having a husband or wife living, who marries another, whether married or single, in a Territory, or other place over which the United States have exclusive jurisdiction, is guilty of bigamy, and shall be punished by a fine of not more than five hundred dollars, and by imprisonment for a term not more than five years; but this section shall not extend to any person by reason of any former marriage whose husband or wife by such marriage is absent for five successive years, and is not known to such person to be living; nor to any person by reason of any former marriage which has been dissolved by decree of a competent court; nor to any person by reason of any former marriage which has been pronounced void by decree of a competent court on the ground of nullity of the marriage contract."

As hereinbefore stated, this is in its essence and nature a local statute; and clearly under the rule for which we contend and which is supported by the decisions cited by the plaintiff in error, the local, not the national, practice was applicable to the case. The indictment was found under the territorial statute providing for a grand jury of fifteen members. The defendant Reynolds claimed that the grand jury was an illegal one, because not consisting of at least sixteen members as required in the case of federal grand juries. The trial court held that the territorial enactment governed, and the Supreme Court sustained the trial court's ruling. It is only by entirely ignoring the fundamental difference between statutes of a

local nature and those of a national or federal nature that the defendants can look upon this case as supporting their views. The fact that Congress has enacted a law does not make it a national law. A law enacted by Congress for a territory is essentially local. If the law be for all the existing territories it is still local. The very wording of the statute involved in this case: "Every person . . . . in a Territory," etc., demonstrates that it is intended to be a local rule applying only where there is no other sovereign which can make and enforce local rules. It was enacted by Congress while performing its function as a local legislature. Moreover, the question raised related only to the constitution of the tribunal and not to the remedy.

Miles vs. United States, 103 U. S. 304, is another case of indictment for bigamy, under section 5352 of the Revised Statutes of the United States. The case arose in the territory of Utah and the Supreme Court held that in impanelling the jury the trial court was bound to follow the law of the territory. What we have said of the Reynolds case applies to this one.

In United States vs. Pridgeon, *supra,* the defendant was indicted for horse-stealing committed in a certain portion of Indian Territory known as the Cherokee Outlet, which was by statute attached to one of the counties of Oklahoma Territory for judicial purposes. The case holds that though by Act of Congress of May 2, 1890 (26 Stat. 81), which created the Territory of Oklahoma out of part of the Indian Territory, the Criminal Code of Nebraska was adopted and put in force in the Territory of Oklahoma, yet

the crime charged against Pridgeon, having occurred outside of the territorial limits of Oklahoma, and within the Indian country, was punishable under the Act of Congress of February 15, 1888, relating to horse-stealing in the Indian country. There was no question before the court as to whether the local practice of Oklahoma Territory or the federal practice should be followed in the case. Apparently the court assumes throughout the opinion that the federal practice should be followed, for on pages 56 and 57 of the opinion we find the following:

> "It admits of no question that under these provisions the District Court for the First Judicial District within and for Logan County, Oklahoma Territory and for the Indian country attached thereto for judicial purposes, sitting as a District Court of the United States, had jurisdiction of offenses committed against the laws of the United States in the Cherokee Outlet, which by the statute and the action of the Supreme Court was attached to Logan County, Oklahoma, for judicial purposes. It is equally clear in respect to the Cherokee Outlet so attached to Logan County, that it was at the passage of the Act of May 2, 1890, and continued to be, Indian country, coming within the provisions of the Act of February 15, 1888, and that the offense of horse-stealing committed therein on November 4 and 12, 1890, was an offense against the United States."

The defendant was sentenced to imprisonment at hard labor for a term of five years, and the federal statute of February 15, 1888, under which the prose-

cution was had, simply provided that one convicted of the crime of horse-stealing in Indian Territory "shall be punished by a fine of not more than one thousand dollars, or by imprisonment not more than fifteen years, or by both such fine and imprisonment, at the discretion of the court." The contention was made in behalf of the defendant that the sentence was void because it imposed hard labor, whereas the statute made no provision for sentencing the defendant to hard labor. In discussing this question the Supreme Court clearly indicates that it considered the federal statute applicable to the question of how and for what term the defendant could be sentenced. There is not one word in the whole opinion which in any measure whatsoever supports the contention of the plaintiff in error in the case at bar, that the territorial practice should be applied in federal cases. Not only was the substantive law of the federal statutes applied in this case, but so far as the opinion itself discloses the federal objective law was likewise applied thereto. For on page 49 in the opinion of Justice Jackson it is stated:

> "At the September term, 1890, of the District Court for the First Judicial District of Logan County, Oklahoma Territory, and for the Indian country attached thereto for judicial purposes, sitting with the powers of a District Court of the United States of America, the appellee, Sidney S. Pridgeon, was regularly indicted for horse-stealing by the grand jurors of the United States of America, within and for Logan County and that part of the Indian country attached

thereto for judicial purposes, *after having been first duly sworn, impaneled, and charged to inquire of offenses against the laws of the United States committed therein.*"

In the case of Thiede vs. Utah Territory, 159 U. S. 510, the plaintiff in error was found guilty by the trial court of the crime of murder alleged to have been committed in said territory. He complained, on appeal, that he had not been furnished two days before trial with a copy of the indictment and a list of the witnesses to be produced on the trial; he contended that section 1033 of the Revised Statutes of the United States, requiring such copy and list to be furnished to an accused in a capital case, was applicable to his case. This was clearly an offense under the local laws of the Territory of Utah, not under the national laws, and the Supreme Court of the United States held that he was therefore not entitled to the benefit of the provisions of said section 1033.

The case of Jackson vs. United States, 102 Fed. 473, which arose in the territory of Alaska, holds simply that in a prosecution for assault with a dangerous weapon, in violation of a local statute, the local law in regard to grounds for challenge of grand jurors is applicable.

The action of Corbus vs. Leonhardt, 114 Fed. 10, was brought in the territory of Alaska for the recovery of a sum of money for medical services, and the question arose whether the doctor who had rendered the services could testify after the decease of his patient in regard to transactions and conversa-

tions between himself and said patient. It was argued in behalf of the personal representative of the patient that the provisions of section 858 of the Revised Statutes of the United States providing that in actions by or against executors, administrators or guardians neither party shall be allowed to testify against the other as to any transaction with or statement by the testator, intestate, or ward, applied to the case; and on appeal the refusal by the trial court so to apply it was alleged as error. The Circuit Court of Appeals for the Ninth Circuit held that said section of the Revised Statutes was not applicable. The cause of action in this case was clearly of a local nature, and therefore the decision is not an authority for the position of the plaintiff in error in the pending case. The case, however, so far as concerns this point, is ill-considered, for it proceeds upon the theory that it is not in conflict with Page vs. Burnstine, *supra,* which we have already considered, whereas it is in direct conflict with the Page case. The Court says, referring to the Page case:

> "That decision was rendered under certain provisions of the act providing a government for the District of Columbia, which are not applicable to Alaska." (p. 12.)

The facts were that notwithstanding the District of Columbia had a law of evidence, provided by Congress, the same as Alaska has its law of evidence, the Supreme Court held that section 858 of the Revised Statutes applied under the statute extending all laws of the United States to the District of Columbia

which were not locally inapplicable. The provisions of section 858 were and are no more "locally inapplicable" to Alaska than they are to the District of Columbia, and we have a statute extending all laws of the United States, not locally inapplicable, to Alaska, namely, section 1891 of the Revised Statutes. If the Page case was rightly decided, we submit that the Corbus case is, on this point, wrongly decided. The Court failed to note the reasons upon which the decision in the Page case was based, namely, that the territories had a local legislature authorized to enact local rules of practice while neither the District of Columbia nor Alaska has.

The conflict of the Page case with that of Corbus vs. Leonhardt is irreconcilable and manifest. In both the actions were upon contracts and were of a local nature, and in both the question arose as to whether testimony of conversations with a deceased person could be given against his personal representative or whether such testimony was rendered inadmissible by section 858 of the Revised Statutes, and both cases arose in districts of the United States which have no local legislatures and for which Congress acts as a legislature; it appears to us that if section 858 was applicable in the Page case, it was applicable in the Corbus case. And the principle applied in the case of Nagle vs. United States, 191 Fed. 141, recently decided by the same court which decided the Corbus case, namely, that section 1891 of the Revised Statutes extends *all* general federal laws to Alaska, certainly involves the overthrow of the Corbus decision.

The prosecution of Cochran vs. United States, 147 Fed. 206, was for larceny of personal goods within an Indian reservation situated within the limits of the Territory of Oklahoma. The Circuit Court of Appeals for the Eighth Circuit considered the question now under discussion foreclosed by the decisions of the Supreme Court of the United States in the cases already analyzed, namely, Reynolds vs. United States, Miles vs. United States, Clinton vs. Englebrecht, Hornbuckle vs. Toombs, and Good vs. Martin; and therefore did not, so far as the opinion discloses, enter upon a detailed or careful consideration of the point now in controversy in the pending case. The question, then, is whether said previous decisions did decide the point. We think it must be clear from the foregoing analysis and from what we have said in regard to the case of Page vs. Burnstine that so far from it being true that this point was decided in those cases, the opinions therein disclose that the subject matter of those cases was of a local nature. The same is true of the Cochran case. It deals with a local not with a federal offense.

In Welty vs. U. S., 76 Pac. 122, it was decided by the Supreme Court of Oklahoma that in prosecutions for murder under a law enacted by Congress in its capacity as a territorial legislature the local procedure applied. The Court considered that question foreclosed by Hornbuckle vs. Toombs, Reynolds vs. U. S., and Thiede vs. Utah.

What has been said about most of the previous cases may be said about the case of Fitzpatrick vs. United States, quoted by counsel. This, too, was a

prosecution under a local territorial statute, and the offense involved was in no sense a federal crime, nor did the procedure in that case conflict with any federal law.

Kie vs. United States, 27 Fed. 351, affords the plaintiff in error some comfort because, as counsel says, the Court held that the question of the qualification of jurors must be determined by the law of Oregon. As has already been seen, Judge Deady, in that decision held that the federal laws of procedure applied. When he held that the law of Oregon applied to the qualification of the jurors it was due to the fact that the federal statutes provided that the qualifications of jurors shall be determined by the qualifications fixed by the law in the respective jurisdictions in which they are drawn, and that Alaska has no other law than the law of Oregon on the subject, and, therefore, the latter applied. Here is what the Court said on that subject:

> "But the question of who is qualified to serve as a juror in the district court of Alaska must be answered by the law of Oregon. Section 800 of the Revised Statutes which declares that jurors in the national courts shall have the qualifications prescribed by the law of the state in which they sit, cannot apply, for there is no law of Alaska on the subject, unless it be the law of Oregon; and in either case it follows that the qualifications of jurors in Alaska, and the liability of persons to serve as such, must be determined by reference to this law."

However, there is nothing in that case to show how

that particular jury was drawn.

United States vs. Ball was a prosecution for murder under the Alaska Code, and that is all there is of that case.

X.

THE COURTS OF ALASKA ARE COURTS OF THE UNITED STATES.

It is argued that section 1024, R. S., applies only to "courts of the United States," that the District Court of Alaska cannot be properly termed a court of the United States, and that, therefore, the section in question does not apply to the latter. This reasoning is based upon fallacious premises. In the first place, it will be observed that section 1024 is not by its terms limited to any particular court but is as general in its scope as it is possible to make it. And, in the second place, in contemplation of the practice provisions of the federal laws, the District Court of Alaska is a court of the United States though it may not be what is termed a "constitutional court" or a court of the United States in contemplation of the tenure of office act. The authorities are uniform that a territorial court in its exercise of jurisdiction over federal cases is a court of the United States in contemplation of the provisions prescribing the practice in federal cases.

Embry vs. Palmer, 107 U. S. 3 (9).

Price vs. M'Carty, 89 Fed. 84.

U. S. vs. Haskins, 3 Saw. 262, 26 Fed. Cas. No. 15,322.

Kie vs. U. S., *supra*.

In the first of these cases it was held that the Su-

preme Court of the District of Columbia is a court of the United States in contemplation of section 709, R. S., Justice Matthews delivering the opinion of the court, saying:

> "The judgment, which is the subject matter of the litigation, is that of the Supreme Court of the District of Columbia, *which is a court of the United States.*"

In Price vs. M'Carty, *supra*, the Circuit Court of Appeals for the Second Circuit held that the District Court of the District of Columbia is a court of the United States in contemplation of the provisions of section 1014. That section provides:

> "For any crime or offense against the United States, the offender may, by any justice or judge of the United States . . . . be arrested and imprisoned, or bailed, as the case may be, for trial before such *court of the United States* as by law has cognizance of the offense."

In the contemplation of this statute it has, of course, been uniformly held that any Court which has jurisdiction over offenses against the United States is a court of the United States. In United States vs. Haskins, *supra*, it is said:

> "It appears to me that, although the district courts of Utah are not courts of the United States, as defined in Clinton vs. Englebrecht (*supra*), they are in another sense not improperly styled courts of the United States as being organized by that government under the authority to make needful regulations for the territories. They are spoken of as such in acts of

> Congress and in opinions of the supreme court. Thus, in Hunt vs. Palao, 4 How. (45 U. S.) 589, the territorial court of Florida is spoken of as a court of the United States, in contradistinction to a state court, and in Clinton vs. Englebrecht the court speak of these courts as acting, in cases arising under the constitution and laws of the United States, 'as circuit and district courts of the United States.' "

As section 1014 is so closely associated with the provisions of the subsequent sections touching practice in federal criminal prosecutions, reason would dictate that the same construction which is given to the term "U. S. court" in one is equally applicable in the other, and if a section which by its own terms is confined to United States courts be construed to be operative in all courts exercising *United States* jurisdiction, it would seem a most arbitrary and unreasonable exercise of judicial power to hold that section 1024, which also relates to the same subject of criminal prosecutions but which is not in its terms limited to any special tribunal, is, nevertheless, confined in its operations to the "constitutional courts" of the United States. By the Act of March 3, 1909, the District Court of Alaska has been given the same jurisdiction as Circuit and District Courts of the United States. The extension of this authority was for the purpose of giving it jurisdiction of crimes committed on the high seas as well as over crimes committed within the territorial limits of the District of Alaska.

U. S. vs. Newth, 149 Fed. 302.

The question in this case is not one of terminology, but one of reason. It is not material to decide whether we should call the courts of Alaska courts of the United States or not, but it is material to determine whether the court of Alaska can be required to discharge the functions of the United States Circuit and District Courts without permitting it to employ the same instrumentalities of procedure devised for the former, it being the contention of the Government that these instrumentalities were devised by Congress as the means of enforcing federal authority in every court charged with that duty.

It has already been shown that Kie vs. United States and Page vs. Burnstine strongly support the position here taken by the Government.

XI.

HISTORY OF SECTION 1024.

The most irrefragable argument in support of the proposition that section 1024 applies to Alaska is afforded by the history of that section. Counsel has anticipated the Government's contention on this point by devoting a very and unreasonably large portion of his brief to an apparent attempt at covering up the most notable features of that history. He admits that this section originated as a part of the law enacted in 1853 fixing the fees for officers of the United States Circuit and District Courts. This, then, is undisputed; but it must also be admitted that the embryo of section 1024 and other general provisions governing practice were included in the Act of 1853, in part for the purpose of preventing the officers from en-

hancing their fees by instituting separate proceedings for causes which ought to be joined. It does not follow, as counsel argues, however, that these general provisions relating to procedure have no force and effect apart from their connection with or relation to the fee bill. They have a general and independent effect apart from their uses in measuring the legality of fees, as may readily be ascertained by examining the numerous decisions under section 1024.

Counsel argues that inasmuch as Congress subsequently, by special enactments, extended the fee system to some of the territories, this circumstance is evidence that Congress did not consider any part of the act to apply to those jurisdictions in absence of specific provisions to that effect. This method of reasoning was employed without avail by the United States attorney before this court in Nagel vs. United States, *supra,* when it was urged by defendant in error that inasmuch as the law of 1887 there involved was an elaborate provision for the care of Indians in the States alone, one clause in one section of that law could not be construed to be applicable to Indians in Alaska simply because that clause was general in its terms. This court, however, in that case had no hesitancy in declaring that particular proviso to be general in its application, though it was a part of an enactment which was otherwise special in its application.

It is, of course, clear that the Act of 1853, in so far as it relates to the fees and costs to be allowed the officers of the Circuit and District Courts of the United States, cannot apply to the territories, for the

simple reason that in the territories there are no Circuit and District Courts of the United States, and for the further reason that there is no general law fixing remuneration for all officers irrespective of where they serve. The remuneration of officers differs in the different districts of the United States.

We may here disregard what counsel says concerning the time when the fee bill enacted in 1853 was extended to the territories and point to the fact that section 1883, R. S., extends that schedule of fees to all territories. It will be noticed that sections 1880 to 1882, R. S., fix the annual salaries of the court officers, then, as the supplement follows, sec. 1883, which reads:

> "The fees and costs to be allowed to the United States attorneys and marshals, to the clerks of the supreme and district courts, and to jurors, witnesses, commissioners, and printers, in the Territories of the United States shall be the same for similar services by such persons as prescribed in chapter sixteen, Title 'The Judiciary,' and no other compensation shall be taxed or allowed."

Chapter 16, "Title Judiciary," is this very fee schedule from the law of 1853. The other sections from that law, including section 1024, had become absorbed in the general provisions of chapter 18 of the same title.

Toward the close of his dissertation on the history of section 1024, and on page 17 of his brief counsel makes this assertion:

> "When the first organic Act was passed for Alaska (the Act of May 17, 1884), the Act of February 26, 1853 was *not* extended to the District of Alaska."

This is all quite true with the exception of the innocent word, "not."

Section 9 of the Act of 1884 provides as follows:

> "The governor, attorney, judge, marshal, clerk and commissioner * * * they shall severally receive the fees of office established by law for the several offices, the duties of which have hereby been conferred upon them *as the same are determined and allowed in respect to similar officers under the laws of the United States,* which fees shall be reported to the Attorney General and paid into the treasury of the United States."

Now, what law is referred to in the expression "established by law for the several offices," and "allowed in respect to similar officers under the law of the United States," if it is not the law of February 26, 1853, later known as chapter 16, title "The Judiciary" of the R. S., and more especially referred to in section 823.

It is perfectly apparent that the law of 1853 *was* extended to Alaska.

Section 823, R. S., is very clearly but a summary statement of the force and effect of the fee provisions of the Act of 1853 and the various other enactments mentioned by counsel's brief touching this subject. Counsel will probably argue that though section 823, R. S., incontrovertibly applies to Alaska and has been

in force and effect there ever since May 17, 1884, yet it required a special enactment to make it applicable. This contention has already been answered by showing that the fee sections in the original law were special in both their terms and practical application, while the other sections were general. But in addition to this it must be observed that section 9, in addition to saying that chapter 16 applies, provides also for the disposition of the fees collected thereunder, which latter proviso is the new feature of the law and undoubtedly accounts for the appearance of the former in section 9, as otherwise the subsequent clause in that same section, as well as section 1891, R. S., would be sufficient to make section 823 operative in Alaska.

But, and here is a most conclusive argument in support of the Government's position, how are we to determine how the fees established by 823 are to be applied and counted except in the light of the provisions set out in sections 921, 977, 980, 982 and 1024, R. S.?

These sections were embodied in our laws from time to time chiefly, and some of them solely, as a guide to the officers in collecting their fees, and as a measure by which the legality of those fees could be settled. We have already referred to most of them in chapter V of this brief and shall let that suffice.

As far as 1024 is concerned, it was said by Judge Taft in United States v. Scott, 74 Fed., that it is simply a re-enactment of the common law already applicable to federal criminal cases. It was evidently inserted in the Act of 1853 for the purpose of

putting the rules of the common law into more clear and explicit terms so as to afford the officers of the court no excuse for collecting excessive fees by instituting a multiplicity of suits when counts should have been joined. It now seems inconceivable that Congress intended to extend the fee system to Alaska without at the same time safeguarding that system by the sections of the Revised Statutes above referred to as having been enacted largely for that purpose. In fact, section 823 is inexplicable except when read in the light of sections 921, 977, 980, 982, and 1024. When, therefore, Congress did not refer to those sections when extending the fee system to the territories by section 1883, R. S., or section 9 of Act of 1887, it must be because it regarded those general practice provisions applicable by reason of the force of the various sections extending the general laws to Alaska.

We submit, therefore, that the history of section 1024 is an incontrovertible argument in support of the proposition that that section applies to Alaska.

XII.

THE QUESTION IS (1) TECHNICAL, NOT SUBSTANTIAL, AND (2) WAIVED BY FAILURE TO STAND TRIAL.

The question as to whether section 1024, R. S., applies to the case at bar is, in the form in which it is raised, purely technical, and does not affect the substantial rights of the plaintiff in error:

1. By section 218, Part I, of the code here in question, "the common law of England as adopted and understood in the United States shall be in force in

said District (Alaska), except as modified by this Act."

At common law several indictments against the same person relating to the same subject may be consolidated for the purpose of the trial.

Commonwealth vs. Rosenthal (Mass.), 97 N. E. 609. Insurance Co. v. Hillman, 145 U. S. 285

By virtue of the aforementioned section 218, this rule obtains in Alaska. Therefore, even though separate indictments had been found for each of the fifty-six counts here involved, such indictments could and should have been consolidated for the purpose of the trial. In fact, such consolidation is made obligatory by section 980, R. S., quoted in chapter V of this brief. If such course had been adopted by the prosecution instead of consolidating the various counts in one and the same indictment, the plaintiff in error would have been in no better position to defend himself. And even if the prosecution had not requested a consolidation of the various separate indictments, the plaintiff in error would have had the right to demand such consolidation to save himself against the annoyance of a multiplicity of trials.

Dolan vs. U. S., 133 Fed. 440 (446).

Pointer vs. U. S., 151 U. S. 396 (400).

By consolidating the counts instead of consolidating the indictments, the position of plaintiff in error has in no way been changed. The distinction he urges is purely technical, not real. If error there was, it was harmless error.

2. The plaintiff in error chose not to risk his case upon a trial. The judgment entered is substantially

the same as a judgment entered on a plea of *nolo contendere,* which is recognized by the federal courts and is tantamount to a plea of guilty.

U. S. vs. Lair, 195 Fed. 47 (152).

U. S. vs. Stone, 197 Fed. 483.

This plea is evidently quite popular in the east, for in a speech delivered by his Excellency, the Attorney General of the United States, at Milwaukee, Wisconsin, February 19, 1912, it was stated with reference to certain criminal prosecutions under discussion:

> "Demurrers were sustained to four of the indictments; pleas of *nolo contendere* (the equivalent of a plea of guilty) entered to eleven of the indictments, involving eighty or more defendants."

The history of the judgment is set out in the judgment itself, and is as follows:

The defendant below demurred, which is equivalent to an admission of the truth of the allegations.

Beal's Criminal Pl. Pr., § 60, p. 53.

But the demurrer was overruled, and if the local code prevailed, he was at liberty either to plead not guilty or have judgment entered upon the demurrer under the terms of section 97, Part II, of the Alaska Code. He chose the latter course, over the protest of the prosecution, the latter claiming that said section 97 did not apply; that, on the contrary, section 1032, R. S., applied. The Court overruled the Government's objection, holding that, under a demurrer, the defendant below could waive a plea and trial,

under the doctrine of Diaz vs. U. S., 223 U. S. 442, and have judgment entered under section 97, or as at common law, if he so desired. This was accordingly done. When, before sentence, the prisoner was asked if he had anything to say why sentence should not be pronounced upon him, he answered that he had not, except that he wished to test the validity of his demurrer (pp. 181 and 183).

There can be no substantial difference between this and the common-law plea of *nolo contendere,* which latter, as before stated, is tantamount to a plea of guilty. The distinction between the proceedings had and the formal plea of *nolo contendere,* or even a plea of guilty, is based upon purely scholastic arguments which should have no weight with the Court in this age of practical common sense.

If, now, the formal plea of guilty or the formal plea of *nolo contendere* had been entered, all objections to the indictment except the general one that it did not state facts sufficient to constitute a crime would have been waived. The law requiring the indictment to accord with certain technical forms is for the purpose of enabling the defendant to defend himself. But where he states that he has no defense and desires to submit none, or even to hear the evidence against him, he is not in a position to complain that he was jeopardized in his defense by reason of technical defects in the indictment. Surely, measured by the rule of reason, if he is not willing to defend or even to deny his guilt, he cannot be heard to complain that he was not afforded that opportunity to properly defend which the law guarantees

him. Only where he denies his guilt and was put to his trial can such objection be urged after judgment. The defendant below having in his general demurrer admitted his guilt, having afterward never denied it, but asked for judgment without trial, he has waived his objection to all technical defects in the indictment.

Moreover, the charge that the indictment was duplicitous, if well founded, could have been obviated by the prosecution electing to go to trial on only one count and dismissing the others.

1 Bishop's Cr. Pr. § 451 et seq.

U. S. vs. Eastman, 132 Fed. 551 (555).

For aught defendant below knows, the prosecution might have elected to try only one count; or defendant might have been acquitted on all. In either case he would not have been injured by the alleged technical defects in the indictment.

The principle runs through all jurisprudence, both civil and criminal, that no one can take advantage of a technical defect unless it results disastrously to himself; in other words, the error must enter into the judgment.

Were the rule otherwise any litigant could withdraw during the middle of a trial after an adverse, erroneous ruling, let the case go against him, then appeal and claim the right to start over anew, though had he stayed in the trial until its close, judgment might have been rendered in his favor in spite of the erroneous ruling. The contention that a litigant may idly stand by and see judgment entered against him simply because some technical question not going

to the merits of the case was erroneously decided against him is at variance with the elementary principle of jurisprudence that no case will be reversed nor even a new trial granted except for some error which had actually resulted in some injury to the complaining litigant and which injury could be obviated on a new trial.

On the point as to whether or not duplicity is cured by the verdict, Bishop says:

> "In matter of principle, it (duplicity) would seem to be a defect of such mere form as ought to be deemed cured by the verdict, because the objection is one which relates simply to the convenience of the defendant in making his defense."
>
> 1 Bishop's Criminal Practice, § 443.

Wharton says:

> "Duplicity in criminal case may be objected to * * * ; but it is extremely doubtful if it can be made the subject of a motion in arrest of judgment, or of a writ of error, and it is cured by a verdict of guilty as to one of the offenses, and not guilty as to the other."
>
> 1 Wharton's Criminal Law, § 395.

So, also, on the same principle,

> "where there is a misjoinder of counts in an indictment, and a conviction on one only, there is no error."
>
> Reed vs. State, 46 N. E. 135.

We submit, that until plaintiff in error has shown that he has given the lower court opportunity to cure

the error, by a verdict or otherwise, he is not in position to complain in this court.

State vs. Davis, 140 S. W. 902.

State vs. Morris, 114 Pa. 476.

In a comparatively recent decision by the Supreme Court, Royal Insurance Company vs. Miller, 199 U. S. 353, the syllabus correctly states the principle pronounced by the opinion as follows:

> "Error committed by the trial court either in admitting evidence or in the legal effect given to the evidence admitted concerning acts which were held adequate to interrupt the course of prescription is not ground for reversal, where the appellate court decides that a longer period of prescription controlled, concerning which the acts of interruption were wholly irrelevant, although the defeated party, *relying on the certainty of a reversal because of such errors, may have neglected to make a full defense, or to assign other substantial errors in the appellate court.*"

As an illustration may be referred to the familiar rule that where evidence is erroneously excluded on any issue and that issue be subsequently decided in favor of the party who offered the evidence there is no cause for complaint on appeal, though the party in question ultimately lost the case. So, also, where a challenge to a juror is erroneously overruled, and the party challenging him as a peremptory challenge remaining unused, or where the verdict is favorable, the error is treated as harmless. So, again, where evidence is erroneously admitted because incompe-

tent, but subsequently other evidence be introduced by cross-examination, or otherwise rendering the former competent, the erroneous ruling becomes harmless. As further illustration of the same general proposition may be referred to the cases holding that orders erroneously granting or denying motions to correct or amend pleading become harmless errors where during the trial, or even after the trial and by the ultimate determination of the case, the feature of the pleading involved in the motion becomes eliminated.

Lloyd vs. Preston, 146 U. S. 639.

Home Life Insurance Company vs. Fisher, 188 U. S. 726.

In the first of these two cases the Court held that where there was no evidence to support allegations of an answer, defendant was not injured by the order of the Court striking them out, even if the order of the Court was irregular. The Court said:

> "But it is plain that the Court treated those allegations as before it, applied the evidence to them, and held that they were not sustained; so that, even if the course of the court was somewhat irregular, in striking out the allegations, and in afterward passing upon them and the evidence offered to support them, the defendants were not thereby injured."

If counsel's theory be correct, the defendant had a right to withdraw from the trial after the Court's ruling upon the allegations in the answer, stand by and see judgment entered against them, and then take an appeal alleging error in striking the allega-

tions in question from the answer.

The reason for this doctrine here contended for is that the ultimate judgment was not affected by the error.

It cannot be said that the alleged error entered into the judgment in the case at bar, for the rule is well settled that where there is a conviction on several counts in the same indictment and there are separate sentences running concurrently, and there is error in any or all counts except one, the error is harmless, as it does not affect the ultimate result.

Harvey vs. U. S., 159 Fed. 419.

See, also, 27 Century Digest, pg. 955.

XIII.

TRIAL BY JURY WAIVED.

Throughout his brief counsel dwells with persistent emphasis upon the injustice perpetrated upon plaintiff in error by the lower court in sentencing him without a trial. The proceedings in this case are sufficiently unusual to be startling when presented in company with the fashionable complaint of steam-rolling, and the psychological possibilities of the situation has not been overlooked in the effort to arouse the suspicion as well as the sympathy of this Court.

Before judgment is passed upon the lower court by this tribunal let us examine the proceedings leading up to the final judgment, some of which having already been referred to in the preceding chapter.

The defendant below entered a general (as well as several special) demurrer to the indictment. This was submitted, without argument, and immediately

overruled (pg. 143). Three or four months later another case came up before the same court in which the question of the applicability of section 1024 arose, was argued and ruled upon specifically.

This evidently gave plaintiff in error the first idea that there might be something in the point and more than four months after the original demurrer had been submitted *pro forma* and overruled he asked leave to resubmit it so as to have the records represent it as having been argued and ruled on in this case (pg. 163).

The prosecution then asked that defendant below enter his plea. This he refused to do, but demanded as his right that he be sentenced under the provisions of section 97, Part II, Alaska Code (pp. 172, 181, 183 and 184).

Against this course the Government protested, claiming that sections 1026 and 1032, R. S., applied (pp. 172, 181, 183 and 184). An argument followed in which the persuasive eloquence of counsel for plaintiff in error prevailed, and he now comes before this court insisting that he purposely and willfully deceived and misled the lower court into committing the error of ruling in his favor and that for this deceit he is entitled to be rewarded by this tribunal (see last page Appendix B), alleging in palliation that it was the only way by which he could save himself from being unjustly dealt with by the lower court. (See last paragraph, pg. 73, brief of plaintiff in error.)

While it may not be an unusual stunt for a limited class of lawyers to deliberately mislead the court into committing errors for the purpose of gaining

time by appeal and reversal, and, by the delay thus gained, ultimate victory, the aristocratic practitioner of that ilk has generally consented to have his name left off the brief in the appellate tribunal. But the case at bar outclasses the classiest encountered in the books where generations of jurists of unusual proclivities have left their tracks. In the case at bar counsel for plaintiff in error not only admits he has deceived the Court, but that he deceived it into making a ruling favorable to his client, alleges error based upon the solicited ruling, and with bewitching innocence comes into this court personally and claims his reward, unwilling apparently to share with others the plaudits of the public for trapping tribunals of justice.

The first objection to be made to the validity of counsel's contention that he is entitled to a reversal of this case because he succeeded in misleading the court into making a favorable ruling is the fact that he has no exception and no assignment of error raising the question as to the soundness of the Court's ruling in the premises. He has a *general* exception to the judgment, but that exception does not point out any specific error in the ruling. Counsel will undoubtedly argue that in a case of this kind this tribunal should waive specific exceptions as inexpedient and tending to awaken a trial court to the fact that it is being imposed upon.

The same will be contended for the absence of an assignment of error. In this case the assignment of errors and application for a writ of error were filed the very day and moment the sentence was passed and judgment entered. Had counsel alleged

error upon the favorable ruling complained of in his brief, he might even at that late hour have apprised the court of the pit "digged" and afforded his Honor an opportunity to correct the error, as any Court can correct its own judgments during the same term in which they are entered. Under the circumstances it will, no doubt, be argued that in cases of this character specific assignments of error should be waived by this Court as an unreasonable restraint upon the profession.

Nothing further will, therefore, be said on this point.

There are other reasons, however, which suggest themselves as sufficient to meet counsel's attack upon the judgment. Some of them have been set out in the preceding chapter; others will follow.

At common law a general demurrer to an indictment was taken conclusively as an admission of the truth of the allegations, and if it was overruled, judgment was entered against the defendant.

1 Bishop's Criminal Practice, § 782 et seq.

Beal's Criminal Practice, § 60, pg. 53.

Professor Beal says:

> "If a demurrer is overruled, the defendant has no right to plead over: final judgment is given against him, whether the offense is felony or misdemeanor. The Court may, however, in its discretion give him leave to withdraw the demurrer and enter a plea; and the absolute right to do this is commonly extended to defendants by statute."

Bishop quotes Hale as saying:

> "If the defendant will demur, and it be judged against him, he shall have judgment to be hanged."

This was the law of the land at the time the Constitution of the United States was adopted, and in the light of that fact the 6th amendment, which counsel appeals to, must be construed. The Constitution was but a confirmation of the common-law right at the time.

While it is true that the Supreme Court has held that a defendant in a felony case could not deny his guilt and at the same time waive trial by jury, it is doubtful if that ruling will be adhered to after the decision in the Diaz case, as in the latter the Court seems to have abandoned as antiquated the scholasticism which governed its former decision referred to by counsel. However that may be, it is certain that no Court has ever held that a defendant in a misdemeanor case cannot waive a jury. And the charge here is a misdemeanor.

Tyler vs. U. S., 106 Fed. 137.
Jewett vs. U. S., 100 Fed. 832.
Richardson vs. U. S., 181 Fed. 1.
U. S. vs. Hillegass, 176 Fed. 444.

Nor has any Court held that a defendant may not waive a jury by a plea of guilty or *nolo contendere.*

Nor has any Court ever held that a defendant even in a felony charge, who enters a general demurrer, but who refuses to withdraw his demurrer or plead over, or even deny his guilt after the demurrer is overruled, must yet be forced to stand trial before a jury. Such proceeding would seem like an unneces-

sary torture of defendant, for by his demurrer he says in substance and effect that if the facts charged in the indictment constitute a crime, he is guilty as charged.

Section 1026, R. S., does not say that defendant after the demurrer is overruled shall be tried, but extends to him the privilege of a trial and assumes that he will avail himself of that privilege.

In this case he refused to accept the offer of a trial, and under the doctrine of United States vs. Diaz, *supra,* the Court held that such offer was a personal privilege extended to him for his own benefit, which he might accept or reject at his pleasure.

The only change in the common law effected by the statute is to give defendant the right to plead over, whereas at common law it was discretionary for the Court to let him do so.

In view of counsel's candor in this case there is some reason for supposing that he will point to the objection of the prosecuting attorney to the proceeding of sentencing defendant below without a trial as persuasive, if not conclusive, evidence that the Court was in error.

This contention as a general proposition, under ordinary circumstances, the Government in the case at bar is not interested in combating. But, it may be pointed out that under the peculiar circumstances of this case it is quite self-evident that the position taken by the prosecuting attorney is only evidence that he is a cautious practitioner desirous of avoiding any question about which even the most frivolous could raise a controversy.

Reverting to the statement that the offenses denounced by section 5209, R. S., are misdemeanors and not felonies, it becomes necessary to add that counsel most likely will now, as he has done heretofore, contend that the New Penal Code changes the grade of these offenses to felonies.

Section 5209, R. S., specifically declares the offenses therein denounced to be misdemeanors. Section 335 of the New Penal Code declares any offense punishable by imprisonment for more than one year a felony. And it has been suggested that this section of the New Penal Code also applies to and amends section 5209, R. S. It will be discovered, however, that section 5209 is not referred to in the New Federal Penal Code and is not embraced within it. As was said by the compilers of the new code, it was "not intended to include in the revision any of the statutory crimes having penal provisions not properly separable from the administrative provisions." The land laws, the customs laws, the banking laws, transportation laws, the pure-food laws, etc., all belong to this class, and neither is included in nor superseded by the Penal Code. These administrative laws with penal provisions are compiled and annotated as the appendix to the Federal Penal Code annotated by George F. Tucker and Charles W. Blood and published by Little, Brown and Company, and now in common use. In the annotations of this work, under section 5209, on page 385, it is stated, giving the authorities, that the offenses defined by this section are misdemeanors, thus clearly intimating that the grade of the offense has not been changed. Section 341 of

the Penal Code proceeds to enumerate the various sections which the code is intended to repeal, and in addition thereto recites at length the various parts of such other sections as it is designed to supersede or amend. It is argued that the last paragraph of section 341 repeals portions of section 5209. This paragraph reads as follows:

> "Also all other sections and parts of sections of the Revised Statutes and Acts and parts of Acts of Congress, in so far as embraced within and superseded by this Act, are hereby repealed; the remaining portions thereof to be and remain in force with the same effect and to the same extent as if this Act had not been passed."

As was said by the Supreme Court in Johnson vs. United States, decided June 7, 1912, discussing the question of whether or not this code amended certain provisions of the Penal Code of the District of Columbia:

> "Of course what was embraced within *and* superseded by the criminal code is repealed by it, but we have to consider, as we have considered, whether the provision of the District Code in regard to the punishment of murder were embraced within the criminal code and the discussion answers as well the contention based on section 1639 . . . . and as said by the Court of Appeals, a cogent reason for the conclusion that they were intended to exist together is found in the repealing provision of the Criminal Code, which in chapter 15 enumerates in detail the

provisions repealed and no reference is made to the District code."

In view of the care with which the framers of the new code have enumerated the various sections and parts of sections to be superseded or repealed, it is strange that nowhere is any reference made to any of the administrative laws above enumerated, which, if counsel's theory be correct, are nearly all, nevertheless, amended by the code. The reasonable construction to be given to section 335 is that it applies only to the offenses denounced by the code of which it is a part. It will be observed that in this new compilation those parts of the various sections touching the grade of the offense have all been eliminated and the parts touching the place and nature of imprisonment have all been amended so as to only provide for "imprisonment" without specifying jail or penitentiary or hard labor as penalties. Sections 335 and 338, therefore, became necessary to make the new code complete, but that reason for their existence applies only to the new code and not to the old enactments.

XIV.

CONCLUSION.

It has been shown conclusively that Congress had good substantial reasons for retaining the federal procedure for federal cases in Alaska, and that therefore the language employed in sections 1 and 10 of the Alaska Practice Code, as well as in the enacting clauses, was used advisedly, intelligently, and purposely, and that it is not the result either of ignorance or accident, as counsel would have it appear.

It is evident that without the use of the federal procedure many federal laws cannot be enforced at all, while the enforcement of others will be so hampered as to render them almost futile. To the latter class of laws belong especially the administrative laws with penal provisions, none of which have been embodied in the New Penal Code, because on account of their peculiar construction their penal clauses cannot well be separated from the body of the purely administrative parts of them.

But in addition thereto it has become apparent that Congress has drafted its administrative and penal laws with a view to their enforcement through the medium of the federal procedure, and, therefore, even in the absence of specific language of the Alaska Code to the contrary, the latter's application to federal offenses could not be sustained.

This case has a far deeper significance to Alaska than the result of this one judgment. The interstate commerce laws are now for the first time being enforced in the territory. So is the Sherman law. So is the bankruptcy law. Several indictments are pending under each in Alaska courts, and, as far as known, the provisions of section 1024 have been taken advantage of by the Government in all. In this the old practice of the Alaska courts has been followed. Though no case has gone to the Appellate Court raising the exact question here involved, that the practice has been usual cannot be disputed. One example may serve as an illustration. As early as 1902 one Idleman, a United States Customs Collector at Eagle, on the Yukon, was indicted in six separate

indictments, some of which contained several counts. These indictments were all consolidated by Judge Wickersham, under the provisions of section 1024. The first trial resulted in a disagreement of the jury. A change of venue was then taken to Juneau, where a second trial was had upon the consolidated indictments before Judge Brown. This resulted in acquittal.

Since this question was seriously raised, the United States Attorney's office at Juneau has had to be excused from prosecuting two cases under the white slave traffic act, because success seemed impossible without joining two or more counts in the same indictment, and the cases had to be brought in Washington as a consequence.

It is a general rule that the practice adopted by the lower court will be upheld by the appellate tribunal when the question is either doubtful, or when no vital principle of right has been violated, as it is sound sense to pay due deference to the judgment of the lower courts on questions of procedure.

In this connection it should be remembered that Judge Lyons is no importation into the country. He is not a stranger to the procedure in the court over which he presides. He had practiced law some twelve or fourteen years in Alaska before he was elevated to a seat on the bench, and it is fair to presume that he did not in this case venture upon a new departure in procedure before the courts of the district.

All of which is respectfully submitted.

JOHN RUSTGARD,
Attorney for Defendant in Error.

APPENDIX A.

In the United States District Court for the District of Alaska, Division No. One.

No. 836–B.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

THE NORTH PACIFIC WHARVES AND TRADING COMPANY, a Corporation, PACIFIC AND ARCTIC RAILWAY AND NAVIGATION COMPANY, a Corporation, THE PACIFIC COAST COMPANY, a Corporation, PACIFIC COAST STEAMSHIP COMPANY, a Corporation, C. E. WYNN JOHNSON, E. E. BILLINGHURST, W. H. NANSEN, IRA BRONSON, J. C. FORD, J. W. SMITH, C. E. HOUSTON, A. L. BERDOE, and F. J. CUSHING,
Defendants.

Opinion.

JOHN RUSTGARD, Esq., United States Attorney, Counsel for the Government.

IRA BRONSON, Esq., *in propria persona,* ROYAL A. GUNNISON, Esq., BOGLE, GRAVES, MERRITT & BOGLE, SHACKLEFORD & BAYLESS, FARRELL, KANE & STRATTON, Counsel for the Defendants.

LYONS, District Judge:

It was agreed between counsel for the defendants

and for the Government in this case, as well as in cause No. 837–B, United States of America vs. Pacific and Arctic Railway and Navigation Company, a corporation, et al., that the questions tendered by the motion might be argued and considered by the Court in the same manner as if raised by demurrer. The Court will therefore consider the case as if a demurrer had been interposed, for in the opinion of the Court the questions presented should be raised by demurrer and not by motion to quash.

The first serious question raised is: Whether or not the indictment is vulnerable to the attack made upon it by the demurrer on account of charging more than one crime. The defendants demurred to the indictment in this and all of the other causes wherein more than one crime is set out in the indictment, and among the grounds assigned in said demurrer is that the indictment charges more than one crime. The defendants rely on section 43 of the Code of Criminal Procedure for the District of Alaska, which provides:

> "That the indictment must charge but one crime, and in one form only; except that where the crime may be committed by use of different means the indictment may allege the means in the alternative."

The Government contends that the section of the Code last cited is not applicable to the prosecution of crimes of the character charged in the indictment, but that the crimes being national in character the procedure with reference to the number of offenses or crimes which may be charged in an indictment is

found in section 1024 of the Revised Statutes of the United States, which provides as follows:

> "When there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses, which may be properly joined, instead of having several indictments the whole may be joined in one indictment in separate counts; and if two or more indictments are found in such case the court may order them to be consolidated."

The question presented is interesting and the determination of the same is not free from difficulty. To uphold their contention the defendants rely on the peculiar wording of certain sections of the Code of Criminal Procedure for the District of Alaska and also upon the following adjudicated cases:

Hornbuckle vs. Toombs, 85 U. S. 21;
Clinton vs. Englebrecht, 80 U. S. 20;
Good vs. Martin, 95 U. S. 90;
Reynolds vs. United States, 98 U. S. 149;
Miles vs. United States, 103 U. S. 304;
Cochran vs. United States, 147 Fed. 10;
Jackson vs. United States, 102 Fed. 473;
Thiede vs. United States, 159 U. S. 510;
United States vs. Haskell, 169 Fed. 449;
Fitzpatrick vs. United States, 178 U. S. 302;
Welty vs. United States, 76 Pac. 122.

It will be observed, after a careful consideration of the case cited, that Clinton vs. Englebrecht and

Hornbuckle vs. Toombs, *supra,* are the leading cases cited by the defendants announcing the doctrine that the various territories created by Congress under the constitution and to whom Congress has delegated the power to legislate for themselves have been empowered under the organic acts creating them to legislate on all matters of local concern not inconsistent with the Constitution of the United States and the organic acts creating such territories. It will also be observed that all the organic acts creating the territories and empowering them to elect local legislatures to legislate for said territories contain substantially the same provision as that conferring legislative authority on the territory of Utah, which is quoted in Clinton vs. Englebrecht, 80 U. S., on page 444, as follows:

> "The legislative power of said territory shall extend to all rightful subjects of legislation, consistent with the Constitution of the United States, and the provisions of this act."

It is apparent from such legislation that Congress intended that the legislatures of the various territories should be vested with full power to legislate not only concerning legal procedure, both criminal and civil, but also to enact any substantive legislation not inconsistent with the Constitution of the United States and the acts of Congress creating such territories. The Supreme Court of the United States in the cases of Clinton vs. Englebrecht and Hornbuckle vs. Toombs, *supra,* holds that the power granted to the legislatures to legislate for the territories, and

the approval of their legislation by Congress, indicates that it was the intention of Congress to lodge in the local legislatures of the territories power to legislate concerning all local matters and to approve such legislation when not in conflict with the Constitution of the United States or the organic acts of such territories. It must therefore be conceded to be the settled law that in a territory where a legislature has been provided for by act of Congress, such legislature has the power to provide for the procedure to govern the trial of all causes without reference to whether or not the same are being conducted under the local laws of the territory or under the general laws of the United States. The Alaska cases cited by counsel which have been passed on by our Appellate Court deal with questions of procedure in the prosecution of violations of the local law. It must be admitted that Alaska is an organized territory within the meaning of Section 1891 of the Revised Statutes of the United States, which provides:

> "The Constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within all the organized territories and in every territory hereafter organized as elsewhere within the United States."

Nagle vs. United States, 191 Fed. 141.

But does it follow because Congress has seen fit to grant to the legislatures of the territories where legislative assemblies are provided to enact a complete set of laws governing procedure in all cases,

that it did not intend to extend to Alaska any of the general laws of the United States providing for the procedure in federal courts? This question must be answered after a careful consideration of the various acts of Congress relating to the organization of the District Court for the District of Alaska and laws of procedure for said District. On May 17, 1884, Congress passed an Act entitled "An Act Providing a Civil Government for Alaska," 23 Stat. L. 24, c. 53. Section 3 of that Act provides, among other things:

> "That there shall be, and hereby is, established a district court for said district, with the civil and criminal jurisdiction of district courts of the United States, and the civil and criminal jurisdiction of district courts of the United States exercising the jurisdiction of circuit courts, and such other jurisdiction, not inconsistent with this act, as may be established by law."

On June 6, 1900, Congress passed another Act entitled "An Act Making Further Provision for a Civil Government for Alaska, and for other purposes," 31 Stat. L. 321, c. 786. The last mentioned Act includes a Political Code, a Code of Civil Procedure, and a Civil Code for the District of Alaska. Section 4 of said Political Code, found on page 132 of Carter's Annotated Alaska Codes, provides, among other things:

> "There is hereby established a district court for the district, which shall be a court of general jurisdiction in civil, criminal, equity, and ad-

miralty causes; and three district judges shall be appointed for the district, who shall, during their terms of office, reside in the divisions of the district to which they may be respectively assigned by the President."

On March 3, 1909, Congress passed an additional Act entitled "An Act to Amend Section 86 of an Act to Provide a Government for the Territory of Hawaii; to Provide for Additional Judges; and for other purposes," 35 Stat. L. 838, c. 269. Section 4 of the last mentioned Act provides, among other things:

> "That there is hereby established a district court for the district of Alaska with the jurisdiction of circuit and district courts of the United States and with general jurisdiction in civil, criminal, equity, and admiralty causes."

By the Act of May 17, 1884, *supra,* the District Court of Alaska is granted dual jurisdiction; that is, the jurisdiction of an ordinary court of record to hear, try and determine all causes, both civil and criminal, of a local nature, and also the same jurisdiction as a district court of the United States, as well as the jurisdiction of a District Court of the United States exercising the jurisdiction of a Circuit Court of the United States. The Act of June 6, 1900, *supra,* limited the jurisdiction of the District Court for the District of Alaska to the trial of local causes. United States vs. Newth, 149 Fed. 302. But the Act of March 3, 1909, *supra,* again conferred such dual jurisdiction upon the District Court for

the District of Alaska which was granted to it by the original organic act of May 17, 1884, *supra.* It is obvious, therefore, that from May 17, 1884, until June 6, 1900, the District Court for the District of Alaska was empowered to exercise dual jurisdiction. From June 6, 1900, until March 3, 1909, the jurisdiction of the District Court for the District of Alaska was confined to matters of local concern. But by the passage of the act of Congress of March 3, 1909, the District Court for the District of Alaska was again clothed with dual jurisdiction. It is manifest, therefore, that the District Court for the District of Alaska has now jurisdiction of the violations of all local laws of the District of Alaska as well as the violations of all national laws applicable to the District of Alaska when the same are committed within the territorial limits of the District or on the high seas.

Section 7 of the Act of May 17, 1884, *supra*, provides:

> "That the general laws of the State of Oregon now in force are hereby declared to be the law in said district, so far as the same may be applicable and not in conflict with the provisions of this act or the laws of the United States."

On March 3, 1899, Congress passed an Act entitled "An Act to Define and Punish Crimes in the District of Alaska and to Provide a Code of Criminal Procedure for said District," 30 Stat. L. 1253. The last mentioned Act contains a Penal Code and a Code of Criminal Procedure. Sections 1, 10 and 13 of the

Code of Criminal Procedure, found on pages 45, 46 and 47 of Carter's Annotated Alaska Codes, provide:

> "Section 1. That proceedings for the punishment and prevention of the crimes defined in Title I of this act shall be conducted in the manner herein provided."
>
> "Section 10. That grand juries, to inquire of the crimes designated in Title one of this act, committed or triable within said District, shall be selected and summoned, and their proceedings shall be conducted, in the manner prescribed by the laws of the United States with respect to grand juries of the United States district and circuit courts, the true intent and meaning of this section being that but one grand jury shall be summoned in each division of the court to inquire into all offenses committed or triable within said District, as well those that are designated in Title one of this act as those that are defined in other laws of the United States.
>
> "Section 13. That the grand jury have power, and it is their duty, to inquire into all crimes committed or triable within the jurisdiction of the court, and present them to the court, either by presentment or indictment, as provided in this act."

The determination, therefore, of the question now under consideration may be solved by a correct interpretation of the three sections of the Code of Criminal Procedure for the District of Alaska last quoted. The defendants contend that section 13 must control, and that by section 13 it is provided

that all presentments or indictments must be in accordance with such Code of Criminal Procedure, and, therefore, must be drawn in accordance with section 43, heretofore quoted, which provides that each indictment must charge but one crime and in one form only. The Government contends that section 1 and section 10 must be construed with section 13 in such manner as to give effect to each and all of said sections. By section 1 it is provided that all crimes defined in Title I of the Penal Code for the District of Alaska must be prosecuted in the manner provided in the Code of Criminal Procedure. Applying the maxim "*Expressio unius est exclusio alterius*" to such section, that is: that express mention of anything in a statute implies the exclusion of all other things, forces the conclusion that the prosecution of all other laws not defined in Title I must be prosecuted in accordance with some other procedure. It is impossible to harmonize the letter of the language used in section 10 with section 1 or with any other part of the Code of Criminal Procedure for the District of Alaska, for section 10 provides, among other things:

> "That grand juries, to inquire of the crimes designated in title one of this Act, committed or triable within said District, shall be selected and summoned, and their proceedings shall be conducted, in the manner prescribed by the laws of the United States with respect to grand juries of the United States district and circuit courts."

It is true that grand juries to inquire of the crimes defined in Title I, *supra*, are selected and summoned

in the manner prescribed by the laws of the United States with respect to grand juries of the United States District and Circuit Courts, but their proceedings are not conducted in the manner prescribed by such laws, for the manner of their proceeding is completely defined and prescribed by the Code of Criminal Procedure itself. What, therefore, is the meaning of and what construction can be given to section 10, *supra*, which will cause it to harmonize with sections 1 and 13 and give effect to all such sections? It is apparent that the framers of section 10 had in mind dual procedure for the District Court for the District of Alaska in the prosecution of crimes, because the Code of Criminal Procedure prescribes a procedure which governs grand juries while they are investigating local or territorial crimes; but section 10 provides that the grand juries shall be governed by the rules of proceedings prescribed by the laws of the United States with respect to grand juries of the United States District and Circuit Courts. It is evident, therefore, that it is necessary in order to arrive at a correct construction of section 10 that the Court disregard its letter and give force and effect to its spirit. While its language is confusing and contradicts section 1, as well as other provisions of the Code of Criminal Procedure, when carefully considered in the light of the dual powers of the Court as well as the other sections of the Code of Criminal Procedure, it is reasonably clear that Congress intended by section 10 to provide for two methods of procedure: one to govern the trial of offenses against the general laws of the United States,

and the other to govern the proceedings in the prosecution of local or territorial crimes defined in Title I of the Act to define and punish crimes in the District of Alaska and to provide a Code of Criminal Procedure in said district. Section 10, therefore, should receive the construction which would be warranted if it contained the following language:

> "That grand juries, to inquire of the crimes designated in Title one of this Act, committed or triable within said District, shall be selected and summoned in the manner prescribed by the laws of the United States with respect to grand juries of the United States district and circuit courts; and grand juries, to inquire of crimes defined in other laws of the United States, committed or triable within said District, shall be selected and summoned and their proceedings shall be conducted in the manner prescribed by the laws of the United States with respect to grand juries of the United States district and circuit courts: the true intent and meaning of this section being that but one grand jury shall be summoned in each division of the court to inquire into all offenses committed or triable within said district, as well those that are designated in Title One of this Act as those that are defined in other laws of the United States."

Such a construction gives effect to the entire section, reconciles it with all other parts of the Code of Criminal Procedure, and harmonizes with all other congressional legislation regarding the organization of the District Court for the District of Alaska, its

jurisdiction and procedure.

"Closely allied to the doctrine of the equitable construction of statutes, and in pursuance of the general object of enforcing the intention of the legislature, is the rule that the spirit of reason of the law will prevail over its letter. Especially is this rule applicable where the literal meaning is absurd, or, if given effect, would work injustice, or where the provision was inserted through inadvertence. Words may accordingly be rejected and others substituted, even though the effect is to make portions of the statute entirely inoperative. So the meaning of general terms may be restrained by the spirit or reason of the statute, and general language may be construed to admit implied exceptions."

36 Cyc. 1108 and 1109, and cases cited;

Holy Trinity Church vs. United States, 143 U. S. 457;

Interstate Drainage & Investment Company vs. Board of Commissioners, 158 Federal, 270.

In the opinion of the last mentioned case, on page 273, the Court used the following language:

"The essential object of judicial construction of a statute is to discover the legislative mind in enacting it. The first step in the analysis is to perceive from the face of the whole act what was the underlying purpose. The intention of a legislative act may often be gathered from a view of the whole and every part of a statute taken and compared together. When the true intention is accurately ascertained, it will always prevail

over the literal sense of the terms. The occasion and necessity of the law, the mischief felt, and the object and remedy in view are to be considered. When the expression in a statute is special or particular, but the reason general, the special shall be deemed general, and the reason and intention of the law-giver will control the strict letter of the law when the latter would lead to palpable injustice, contradiction, and absurdity."

See, also, Wisconsin Industrial School for Girls vs. Clark County, 79 N. W. Rep. 422; State vs. Railroad Commission, 117 N. W. Rep. 846; wherein the Court, among other things, said:

"The actual judicially determined legislative intent must always govern if expressed at all so as to be discernible by the searchlights which the court possesses. They permit of looking at a written law as a whole, to the subject with which it deals, to the reason and spirit thereof, to give words a broad or narrow construction, going either way to the limits of their reasonable scope, to supply omitted words which are clearly in place by implication, to change one word for another in case of the wrong one being clearly used and so read out of the enactment the real intent, even though it may be contrary to the letter thereof. . . . . One of the most familiar and safe canons of construction may be stated thus: for the purpose of clearing up obscurities in a law it should be read with reference to the leading idea thereof,—such idea being regarded as such

> limitation upon particular words or clauses and expansion of others within the scope thereof, in connection with that of words clearly implied,—and be thus, if reasonably practicable, brought into harmony with such idea."

Unless section 10 is construed so as to limit the following language:

> "That their proceedings shall be conducted in the manner prescribed by the laws of the United States with respect to grand juries of the United States district and circuit courts,"

in its application to the rules of procedure that govern the grand jury while investigating violations of the general laws of the United States, it is meaningless, and contradicts section 1 as well as all other provisions of the Code of Criminal Procedure, for it isn't true that grand juries when investigating crimes defined in Title I, *supra,* follow the procedure governing grand juries of United States courts; but do follow the procedure prescribed by the Code of Criminal Procedure.

We must next consider the true intent and meaning of section 13, bearing in mind that section 10 provides that grand juries inquiring of crimes not defined in Title I, *supra,* shall be governed by the procedure followed by grand juries of the United States District and Circuit Courts. We find that section 13 does not in any manner contradict section 10 when so construed, for it provides:

> "That the grand jury have power and it is their duty to inquire into all crimes committed or triable within the jurisdiction of the court

and present them to the court either by presentment or indictment, as provided in this Act."

That is, if the grand jury is investigating a local crime, it shall follow the specific provisions of the Code of Criminal Procedure; if it is investigating national crimes, or infractions of laws not defined in Title I, it shall follow the procedure prescribed by the laws of the United States with respect to grand juries of the United States District and Circuit Courts. Thus, both procedures are provided for by this Act, that is, the Act to define and punish crimes in the District of Alaska and to provide a Code of Criminal Procedure in said District, by giving section 10 the construction heretofore indicated. The proceedings prescribed by the laws of the United States with respect to grand juries for the United States District and Circuit Courts are a part of the Code of Criminal Procedure, and are made to apply to and govern the grand jury when investigating violations of laws other than those defined in Title I, *supra;* that is: Section 10 incorporates in and makes such procedure a part of the Act referred to in section 13, and when the grand jury, while inquiring into violations or infractions of the general laws of the United States, follows the federal procedure, it is proceeding according to the requirements of section 13. Nor does such a construction of the three sections in any way bring section 1 in conflict with the other two sections, for section 1 provides for the entire proceeding in the punishment of crimes defined in Title I; not only the proceedings that govern the grand jury but also the proceedings that gov-

ern the trial of such criminal cases, while sections 10 and 13 merely deal with the proceedings of the grand jury.

> "Statutes *in pari materia* are those which relate to the same person or thing, or to the same class of persons or things. In the construction of a particular statute, or in the interpretation of any of its provisions, all acts relating to the same subject, or having the same general purpose, should be read in connection with it, as together constituting one law. The endeavor should be made, by tracing the history of legislation on the subject, to ascertain the uniform and consistent purpose of the legislature, or to discover how the policy of the legislature with reference to the subject-matter has been changed or modified from time to time. With this purpose in view, therefore, it is proper to consider, not only acts passed at the same session of the legislature, but also acts passed at prior and subsequent sessions, and even those which have been repealed. So far as reasonably possible, the several statutes, although seemingly in conflict with each other, should be harmonized, and force and effect given to each, as it will not be presumed that the legislature, in the enactment of a subsequent statute, intended to repeal an earlier one, unless it has done so in express terms; nor will it be presumed that the legislature intended to leave on the statute books two contradictory enactments. Whenever a legislature has used a word in a statute in one sense and with

one meaning, and subsequently uses the same word in legislating on the same subject-matter, it will be understood as using it in the same sense, unless there be something in the context or the nature of things to indicate that it intended a different meaning thereby. It must not be overlooked, however, that the rule requiring statutes *in pari materia* to be construed together is only a rule of construction to be applied as an aid in determining the meaning of a doubtful statute, and that it cannot be invoked where the language of a statute is clear and unambiguous."
36 Cyc. 1147, 1148, 1149, 1150, and cases cited.

In the light of the fact that Congress has seen fit to confer on the District Court for the District of Alaska the jurisdiction of a United States District Court and the consequent power to try all cases involving the violation or infraction of the national laws committed within the said District, and in the further light of section 1891 of the Revised Statutes, which extends to all territories the constitution and all laws of the United States that are not locally inapplicable, which section has been held to apply to Alaska (Nagle vs. United States, 191 Fed. 141), the Court should not assume that the provisions of the general statutes of the United States governing the procedure in the federal courts were not extended to the District of Alaska unless the legislation of Congress makes manifest its intent to extend only the substantive laws of the United States to the District and to withhold the general laws of procedure. It follows, therefore, that section 1024 of the Revised Statutes, *supra,* applies to Alaska, and may be fol-

lowed by the grand jury when considering infractions of laws of the United States not defined in Title I of the Act to define and punish crimes within the District of Alaska and to provide a Code of Criminal Procedure for said District.

Since Congress has reserved to itself the exclusive power to legislate for Alaska, has extended to this territory all the general laws of the United States not locally inapplicable, and has conferred on this Court the jurisdiction of a United States District Court to punish all violations of such laws, what could be its purpose in refusing to extend to this district the laws and rules of procedure of the United States District Courts, which the light of experience has proved to be so adequate and satisfactory in the prosecution of offenses of the character charged in the indictment. Section 1 of the Code of Criminal Procedure, *supra*, clearly implies the existence of other rules of procedure applicable to inquiries concerning crimes not defined in Title I of that Act and the intention of Congress to provide such other rules of procedure to govern the proceedings of the grand jury when inquiring into violations of the general laws of the United States is manifested in section 10 of the same code.

The defendants further contend that section 2 of what is commonly known as the Sherman Act does not apply to Alaska, for it provides:

* * * * * * * * *

Given in open court at Juneau, Alaska, on the 29th day of April, 1912.

THOMAS R. LYONS,
Judge.

APPENDIX B.

Oral Opinion of Trial Court, Case at Bar.

Ten o'clock A. M., Monday, May 20, 1912.

Mr. SHACKLEFORD.—If the Court please, in the case of the United States versus Summers, I have filed a formal election to stand on the demurrer, and if your Honor desires to examine it I presume it is on file.

Mr. RUSTGARD.—I wish the journal to show that I object to that form of procedure at this time; that the procedure should be had as provided by sections 1026 and 1032 of the Revised Statutes, and I put my objection in the form that I would like it to go on the journal, your Honor.

Mr. SHACKLEFORD.—Have you the original election? That simply raises the question which was argued the other afternoon. We are ready to submit the motion also.

The COURT (LYONS, J.).—I have given the matter considerable consideration, gentlemen, and gave it extended consideration at the time of an analogous question in the case of the Transportation cases—in the case of the United States versus The Pacific and Arctic Railway and Navigation Company, and others. In that case the demurrer was interposed to the indictment and alleged, among other things, that the indictment joined more than one count and for that reason was not in accordance with the provisions of the local code. The Court held that the prosecution being for an infraction of the laws of the United States, general laws of the United States,

or one of them, the procedure provided for in the local code did not apply and overruled the demurrer for that reason.

The question is now raised as to whether or not after proceeding beyond the indictment whether or not the Federal procedure still obtains or the local code governs. It is true, as argued by counsel for the defendant, that the Court based its ruling largely in the Transportation cases on the construction of three sections of the criminal code, to wit: 1, 10 and 13; which seemed to the court to negative the idea that only one system of practice obtains in Alaska, and that section 10 in the nature of things must contemplate two procedures, for it says that grand juries shall be selected and summoned and their proceedings shall be in accordance with the laws of the United States. If the letter of that statute is followed, it renders nugatory the entire local code governing the trial of local cases; so the Court held that what the statute must mean was that when prosecuting cases for infractions of the general laws that the law means that grand juries shall be selected and summoned and their proceedings shall be governed by the general laws of the United States, but when the grand jury is operating within the jurisdiction of a territorial organization purely, then the grand jury is summoned and selected according to the laws of the United States, the general laws of the United States, but their procedure is governed by the local code.

Proceeding, now, and assuming that the Court was right in so holding, and I will say, gentlemen, that

the more I consider the question—while I realize it is not entirely free from difficulty—the more I reflect on the matter, the more I am convinced that that is the only theory upon which to proceed to give all the laws which apply to Alaska a reasonable construction. Section 1891 of the Revised Statutes of the United States provides the constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within all the organized territories and in every territory wherever organized as elsewhere within the United States. There has been some controversy in the past whether or not that section applied to the District of Alaska, but that has been settled by the Nagle case that Alaska is an organized territory within the meaning of that statute, and that all of the laws of the United States and the Constitution, unless the laws are locally inapplicable, are the laws of the District of Alaska the same as they are in every part of the United States. That being true, what position are we in? We read, then, in conjunction with that the opening section of the Code of Criminal Procedure, which provides as follows:

> "That proceedings for the punishment and prevention of the crimes defined in Title I of this Act shall be conducted in the manner herein provided."

We find in Title I that it refers to the Criminal Code of the District of Alaska. Under the maxim that the expression of one means the exclusion of others, the natural and inevitable construction placed

upon that, the opening section, is that the Code of Criminal Procedure applies to the crimes defined in Title I, which are laws peculiarly local in their nature and only refer to the District of Alaska and to no other part of the United States. Now, proceeding, then, and it seems to me that is a fair and reasonable construction of that section, taking that in conjunction with the section of the United States statutes just read, section 1891, and what have we? We have section 1891 transferring all the laws of the United States to the District of Alaska not locally inapplicable. Now, why say that transfers the substantive law but not the law of procedure? It would seem that if Congress conceived the idea it was necessary to transfer the substantive law, that unless its will were declared in specific terms to the contrary that the law of procedure should also follow. Now, what is there about the federal practice which cannot be considered applicable in the District of Alaska? The peculiar character of the crime charged? The same is true of the Transportation case, which has been deemed wise to allow the joinder of more than one count. If that is true in the State of Washington, why shouldn't it be true in the District of Alaska. Of course, I don't mean to say that if there is anything in the acts of Congress that indicate the contrary that this court has any right, or any other court has any right, to say that because it looks reasonable it must be so, but if it looks reasonable and if it is in consonance with the reasonable construction of our own statute, and if there is nothing in any of the acts of Congress which declare to the con-

trary, then why should Congress say we will give you the substantive law, but we will withhold the ordinary machinery which is followed in the trial of an infraction of such law?

Now, let us see if there is anything in conflict with that in the cases that counsel cites. In the Coquitlam case the only question involved was whether or not an appeal would lie from this District Court to the Circuit Court of Appeals, the Circuit Court of Appeals having been constructed by the act of 1891. It was conceived that because the words "District and Circuit Courts of the United States" were used and only referred to constitutional courts, this not being a constitutional court, therefore no appeal would lie from it. The Supreme Court of the United States held that it was a Supreme Court of the territory, the highest court in the territory, and for that reason under other provisions of the same act an appeal would lie to the Circuit Court of Appeals for the Ninth Circuit. In the McAllister case, counsel is right when he contends that the question was as to whether or not the President of the United States could remove or suspend a Judge of this court, and the majority of the Court held that he could, and held that the act under which he dismissed Judge McAllister and which act excepted from the power of the President to so dismiss courts of the United States. Justice Harland, in writing the opinion of the majority of the court, held that this was not a court of the United States under the third article of the Constitution, which provides that the judicial power of the United States shall be reposed in a Su-

preme Court and as many inferior courts as Congress may from time to time organize and create, but that this was a court created by Congress under the general provisions of the Constitution, which provide that Congress has complete control over the territories and may legislate for them as it sees fit.

Is there anything incompatible with saying that this is not a court of the United States in the constitutional sense and the ruling of the court on this occasion? I think not, Mr. Shackleford. I concur with you when you say it isn't a court of the United States in a constitutional sense. I will go further and agree with you that when the acts of Congress mention courts of the United States, they don't mean this court, because this is a territorial court pure and simple, but it exercises the jurisdiction of courts of the United States and when it exercises the jurisdiction of courts of the United States and when Congress says that all laws not locally inapplicable are transferred to the District of Alaska, then it seems to me that it is a perfectly natural construction to give it, although it is not a court of the United States. Yet, when it is sitting and exercising that jurisdiction to enforce the laws of the United States, unless there is some negativing act of Congress withdrawing from it the right to use the procedure which the federal courts use, under that section of the act of Congress, it is a natural and reasonable construction to give it that not only the substantive law but the machinery, the procedure which enables the court to enforce the substantive law, applies, and unless I am wrong in the ruling in the Transportation case, I am

satisfied that the Court is right now, because one couldn't be correct, in my judgment, and the other incorrect, because if a portion of the procedure is applicable, the whole of it is applicable. Therefore, it seems to me that the only procedure that can be followed in this case is the federal procedure, and that deprives the court of the power to enter a judgment in a criminal case against any man without a trial.

Ten o'clock A. M., Tuesday, May 21, 1912.

COURT.—In the case of the United States against Summers, while I am satisfied, as held yesterday, that the federal practice prevails in Alaska, yet I am also satisfied that practice can be waived so long as it is invited by the defendant himself. However, I wasn't giving this matter any consideration yesterday. The only question before the Court for consideration was whether or not the federal practice or the local practice obtained, and I am satisfied that the federal practice obtains; that is, I say it is a matter of procedure, and I am satisfied that the defendant can waive any procedure under the Diaz case and elect to stand on the local practice. Now, at this time, I understand the defendant still asks to be sentenced without proceeding further with the trial.

Mr. SUMMERS.—Yes, sir.

No. 2177.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

C. M. SUMMERS,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

REPLY BRIEF.

L. P. SHACKLEFORD,
SHACKLEFORD & BAYLESS,
Attorneys for Plaintiff in Error.

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FILED
NOV 6 - 1912

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REPLY BRIEF.

ARGUMENT.

The rule of law announced in United States vs. Fitzpatrick, has not been changed, giving to Section I, part 2 of the Alaska Code of Criminal Procedure its widest meaning. No effort was made in the brief of the United States Attorney to answer the proposition discussed on pages 34 and 35 of the brief of plaintiff in error.

At the argument of this case before the Circuit Court of Appeals, the proposition was plainly put in the opening statement of the plaintiff in error, and no

attempt was made on the part of the United States Attorney to answer the contention. Briefly to repeat the proposition it is this:

Under the authority of the *United States against Fitzpatrick,* 178 U. S., 304, all indictments, whether for violations of law described in the Revised Statutes, or for violation of local laws, must be tested by the Oregon law in effect on May 17th, 1884, so that when the Criminal Code of March 3rd, 1899, was passed, and Section I, which reads as follows, was adopted:

> "That proceedings for the punishment and prevention of crimes as defined in Title I of this Act, shall be conducted in the manner herein provided."

Still the rule in the Fitzpatrick case was left in effect with reference to the prosecution of crimes not defined in Title I. Fitzpatrick was prosecuted for an offense defined in the Revised Statutes of the United States, and not for an offense defined by the laws of Oregon.

Section I, Part 2, does not provide any other different or new method for the prosecution of crimes not defined in Title I, and no section of the Alaska statutes can be pointed to creating a dual system of procedure, or changing the old law as announced in the Fitzpatrick case.

Section 43 of the Alaska Criminal Code was in effect in Oregon in 1884, and it makes no difference whether the plaintiff in error in this case is protected

by the old Oregon law, or is protected by the new Code of Criminal Procedure.

It seems to us that this point is decisive of the whole case, and every attempt was made to force it upon the attention of the government by the discussion in the briefs, and by the opening oral argument. Yet no attempt has been made to reply to the proposition above stated.

VIOLATION OF SECTION 5209 OF THE REVISED STATUTES RELATING TO NATIONAL BANKS IS NOW A FELONY.

At page 98 of the brief of defendant in error, we find the contention that the violation of Section 5209 is a misdemeanor. It is true that the acts denounced by this section were originally declared to be misdemeanors, but the new Criminal Code, Section 335, Supplement Compiled Statutes, page 1687, reads as follows:

> "All offenses which may be punished by death or imprisonment, or for a term exceeding one year, shall be deemed felonies. All other offenses shall be deemed misdemeanors."

The specific point in question was decided by the Circuit Court of Appeals for the First Circuit in the case of *Kelleher* vs. *United States,* 193 Fed., 8. At page 11, the Court uses the following language:

> "The indictment takes up only ten of these fifty transactions, having only ten counts, giving the first

as of December 6th, 1909, making the second transaction December 9th, and running through to include December 31st. There were some transactions after December 31st, that is in January, 1910, which were not relied upon in this proceeding because if they had been prosecuted, they would have been justifiable under the Penal Code (Act March 4, 1909, page 321, 35 Stats. at Large, 1088, U. S. Comp. St. Supp. 1909, page 1391). All became effective as of January 1st, 1910, which rendered these offenses, after it became effective, felonies, while under the revised statute before the Penal Code became effective, they were misdemeanors. Of course the two classes could not be joined in the same indictment."

The prosecution in the Kelleher case was under Section 5209 of the Revised Statutes, and the specific point passed on contrary to the contention made by the defendant in error in this case.

SECTION 1024 AND THE OTHER GENERAL PROVISIONS WITH REFERENCE TO PROCEDURE FOUND IN THE REVISED STATUTES, REFER ONLY TO THE PROCEDURE IN UNITED STATES DISTRICT OR CIRCUIT COURTS AND HAVE NO APPLICATION WHATEVER TO THE PROCEDURE IN THE TERRITORIAL COURTS.

Counsel for the defendant in error, contends in his brief that any statute of the United States, whether of procedure or substance, applies to Alaska, and in this respect counsel seems to entirely misconceive the

course of judicial decision with reference to the application of the statutes relating to procedure.

Shortly after the adoption of the Constitution, an Act was passed by Congress known as the "Judiciary Act," which related entirely and exclusively to procedure in the United States District and Circuit Courts. From time to time this act was amended, modified and added to, and the Judiciary Act as so amended, modified and added to, is found in the Revised Statutes of the United States under the title "Judiciary." It is under this title that we find Section 1024.

These acts relating to procedure apply only to United States District or Circuit Courts, and the extension of the laws of the United States to the District of Alaska, Section 1891, and the Act of May 17th, 1884, did not extend the provision with reference to procedure to the Territorial Courts. If counsel's contention is correct, then the Act relating to procedure in the Court of Claims is a statute of the United States, and might as well be held to have become a part of the procedure to the District of Alaska.

The course of judicial decision with respect to the application of the statutes of these territories, is perfectly clear and plain.

In the case of *Corbus* vs. *Leonhardt,* this Court held that Section 858 of the Revised Statutes, which is found under the title of Judiciary, had no application to practice in the territorial courts because it was

originally intended to apply only to practice in United States District and Circuit Courts.

See *Corbus* vs. *Leonhardt,* 114 Fed., 10.

In the case of *United States* vs. *Hall,* 147 Fed., 32, it was held that Section 1033 of the Revised Statutes of the United States had no application to procedure in the territorial courts, because it was originally intended as a statute relating to procedure in United States District and Circuit Courts.

Section 1033 is found under the same title and subdivision as Section 1024. See *United States* vs. *Ball,* 147 Fed., 32.

Likewise, the Supreme Court of the United States in the case of *Thied* vs. *Utah,* 159 U. S., page 510, held that Section 1033 does not control the practice and procedure in territorial courts.

In the case of *Goode* vs. *Martin,* 95 U. S., page 90, it was held that the provisions of the revised statutes relating to the exclusion of witnesses, have no application to practice in the territorial courts, and the language used in the case of *Goode* vs. *Martin* is quoted with approval by this Court in the cast of *Corbus* vs. *Leonhardt.*

In the case of *Clinton* vs. *Englebright,* 80 U. S., 434, the Court uses the following language:

> *"If this opinion needed additional confirmation, it would be found in the Judiciary Act of 1789. The regulations of that Act in regard to the selec-*

tion of jurors, had no reference whatever to the territory. They were framed with reference to States and cannot without violence to the rules of construction, be made to apply to territories of the United States. If then this subject were not regulated by territorial law, it would be difficult to say that the selection of jurors had been provided for at all in the territories."

The intention of Congress to have its law of procedure apply to territorial courts only where the territorial courts are specifically mentioned, is quite evident from the Act of July 22nd, 1813, referring to civil causes, which is as follows:

BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, That whenever there shall be several actions or processes against persons who might legally be joined in one action or process, touching any demand or matter in dispute before a court of the United States OR OF THE TERRITORIES THEREOF, if judgment be given for the party pursuing the same, such party shall not thereon recover the costs of more than one action or process, unless special cause for several actions or processes shall be satisfactorily shown on motion in open court.

Sec. 2. BE IT FURTHER ENACTED, That whenever proceedings shall be had on several libels against any vessel and cargo which might legally be joined in one

libel before a court of the United States OR OF THE TERRITORIES THEREOF, there shall not be allowed thereon more costs than on one libel, unless special cause for libelling the vessel and cargo severally shall be satisfactorily shown as aforesaid. And in proceedings on several libels or informations against any cargo or parts of cargo or merchandise seized as forfeited for the same cause, there shall not be allowed by the court more costs than would be lawful on one libel or information, whatever may be the number of owners or consignees therein concerned: but allowance may be made on one libel or information for the costs incidental to several claims: PROVIDED, That in case of a claim of any vessel or other property seized on behalf of the United States and libelled or informed against as forfeited under any of the laws thereof, if judgment shall pass in favor of the claimant, he shall be entitled to the same upon paying only his own costs.

Sec. 3. AND BE IT FURTHER ENACTED, That whenever causes of like nature, or relative to the same question shall be pending before a court of the United States OR OF THE TERRITORIES THEREOF, it shall be lawful for the court to make such orders and rules concerning proceedings therein as may be conformable to the principles and usages belonging to courts for avoiding unnecessary costs or delay in the administration of justice, and accordingly causes may be consolidated as to the court shall appear reasonable.

And if any attorney, proctor, or other person admitted to manage and conduct causes in a court of the United States OR OF THE TERRITORIES THEREOF, shall appear to have multiplied the proceedings in any cause before the court so as to increase costs unreasonably and vexatiously, such person may be required by order of court to satisfy any excess of costs so incurred.

Approved, July, 22, 1813.

The Act just quoted is found in the Revised Statutes of the United States, Sections 921, 977, 978 and 982. It is evident that only those sections of the Revised Statutes relating to procedure which specifically mention the courts in the territories, have application to those courts. These Sections are discussed by the defendant in error at pages 40 to 43 of the brief.

A reading of the Act shows that as early as 1813, Congress deemed it necessary to specifically mention the territories whereof it was intended that the Act of procedure should apply thereto. We find this remarkable statement with reference to *Fitzpatrick* vs. *United States:*

> "What has been said in most of the previous cases, may be said of the case of *Fitzpatrick* vs. *United States,* quoted by counsel. This too, was a prosecution under a local territorial statute, and the offense involved was in no sense a Federal crime."

Fitzpatrick was prosecuted for a violation of Sec-

tion 5339 of the Revised Statutes of the United States, and not under the local territorial statute, or under the law of Oregon. The decision in that case shows plainly the distinction as to what statutes of the United States are applicable to the District of Alaska. The procedure of Oregon is applied, but the defendant in the case was prosecuted for a violation of the general laws of the United States, to-wit, Section 5339.

See *Fitzpatrick* vs. *United States,* 178 Fed., page 304.

The application of the local procedure to prosecutions under general laws of the United States is fully and specifically dealt with in the opinion of Mr. Justice Vandevanter in the case of *Cochran* vs. *United States,* 147 Fed., 206, and no amount of argument or explanation can qualify or limit the express meaning and scope of that decision. The language is unequivocable.

Counsel relies all through the brief principally upon the case of *Page* vs. *Bernstein,* 102 U. S., page 664, and we are surprised at the attempt to use this case in view of the language used by this Court in the case of *Corbus* vs. *Leonhardt,* 114 Fed., page 12, which is as follows:

Page vs. *Bernstein,* cited by the plaintiff in error, is not in opposition to these views. That decision was rendered under certain provisions of the Act provid-

ing a government for the district of Columbia, which are not applicable to Alaska, and in the course of the opinion, the Court said:

> "These views do not at all conflict with the previous decisions of this court, holding that certain provisions of the general statutes of the United States relating to practice and proceedings in courts of the United States are locally inapplicable to territorial courts."

Great reliance is placed by the defendant in error upon the decision of Mr. Justice Zane in the case of *United States* vs. *Jones,* 18 Pac., 233. It is sufficient to say that this opinion was dissenting opinion and that the rule announced in the case of *United States* vs. *Jones* was exactly contrary to the rule contended for by the defendant in error in this case.

Great reliance is also placed upon the opinion of the Supreme Court of New Mexico in the case of *United States* vs. *Folsom,* 38 Pac., 70. An examination of the laws of New Mexico would show that there is no provision prohibiting the joinder of counts in an indictment such as is contained in the Alaska Code, and in the laws of Oregon. An examination of the opinion will further show that the leading cases on the question of practice in the territorial court, are not cited or discussed. There is no dispute in this case about the application of the statute of limitations, for the Alaska Code expressly adopts the

Federal Statute of Limitations, and that statute is so worded that it would apply to the prosecution of the crimes denounced by the Revised Statutes, no matter in what court the prosecution was instituted.

We are surprised at the attempt of the defendant in error to use the case of *Nagle* vs. *United States,* 191 Fed., 141, as an authority in favor of the defendant in error in this suit. In that case it was contended unsuccessfully by counsel for the government (the same counsel appears for the defendant in error in this case) that Alaska was an exception to the general rule, and that the statutes and decision referring to territories of the United States had no application to the District of Alaska; in other words, the District of Alaska stood in a peculiar position.

An examination of the government's brief in that case would show that strenuous efforts were made to prevent the application of the general laws and principles announced with reference to the territory of Alaska. In this effort, counsel for the government failed. Judge Wolverton in a very exhaustive opinion, 191 Fed., page 145, disposes of this question as follows (referring to the Act of May 17th, 1884): "This act was superseded by the Act of June 8th, 1900, (31 Stat. 321) which provided for a complete political, criminal and Civil Code for the government of Alaska, omitting all restrictions as contained in Section 14 of the old Act. Could any more adequate and complete organization of the territory of Alaska

be had? True, no legislative body is provided for, but Congress constitutes that body, if such a one is requisite to give Alaska the status of an organized territory."

It is interesting to note that since the disposition of this case in the lower court, Congress has provided a legislative assembly for the District of Alaska. The act was passed in the month of August this year, and we are unable to give the citation as the volume of the Statutes at Large containing the Act, has not yet been published. The entire course of judicial procedure in the last few years has been to put Alaska on exactly the same footing with any of the other territories.

See

> *Nagles* vs. *United States,* 191 Fed., 141;
> *Rasmussen* vs. *United States,* 197 U. S., 516;
> *Binns* vs. *United States,* 194 United States, 486,

and the recent decision in the case of the *Interstate Commerce Commission* vs. *United States* found in the Advance Sheets of the Supreme Court Reporter for the last term.

It was admitted by the Judge in rendering the opinion in this case in the lower court, that if Alaska is not an exception to the general rule with reference to territories, Section 1024 could not apply, and Section 43 of the Alaska Code would control. In this connection, the Court uses the following language:

> "It must therefore be conceded to be the settled law that any territory where a legislature has been provided for by Act of Congress, such legislature has the power to provide for the procedure, to govern the trial of all causes without reference to whether or not the same are being conducted under the local law of the territory, or under the general laws of the United States."

We have then under the authority of *Nagle* vs. United States, a decision that Alaska is a full-fledged territory. She now has a legislature, and if the defendant in error prevails in its contention in this case, we will have a decision to the effect that Alaska is not like the other territories and that the cases applicable to the other territories do not apply to Alaska.

THE DOCTRINE OF FEDERAL NECESSITY.

All through the brief of the defendant in error we find the following remarkable doctrine appealed to:

> "The application of local procedure to federal crimes would lead to conflict of authority, and would result in crippling the *Federal sovereign."*

We understand the brief of the United States Attorney correctly. He takes the position before this court of urging that Section 1024 be declared applicable to the prosecution in the case at bar, because it would strengthen the government. In other words, the United States considers it a great calamity that Section 1024 should not apply to the District of Alaska.

At the end of the brief we find the following:

> "Since this question was seriously raised the United States Attorney's office at Juneau has had to be excused from prosecuting two cases under the white slave traffic act, because success seemed impossible without joining two or more counts in the same indictment, and the cases had to be brought in Washington as a consequence."

We take this as a clear admission on the part of the United States Attorney that in spite of the ruling of the lower court in this case, the United States has become convinced that their position of Section 1024 as applied to Alaska is untenable and therefore that they have ceased to prosecute by joining counts in the indictment.

Since the organization of Alaska as a territory in 1884, up to the present date, there is no precedent to sustain the procedure of the United States in this case, except the Idleman case cited at page 101 of the brief of defendant in error, and the question involved in that case was never brought to an Appellate Court because Idleman was acquitted. It is to be noticed also that the District Attorney, who indicted Idleman, started out upon the assumption that Section 1024 did not apply to Alaska, for he was indicted separately for a number of different offenses of the same class, and subsequently the indictments were consolidated.

The very citation of the Idleman case, and the fact

that no other precedent can be found, certainly develops the weakness of the government's position in looking for a precedent over a period of some twenty-six years.

An examination of the opinion of the lower court shows that the Court was in considerable doubt and perplexed as to the application of Section 1024 to procedure in Alaska. That the lower court was prepared to have this question brought to this court and disposed of before the trial of Mr. Summers, is apparent from the language quoted at page 128 of the brief of defendant in error. The right to have the indictment state only one offense is a substantial right of which the defendant cannot be deprived. To argue the question would be to argue a self evident truth.

Pages 92 and 97 of defendant's brief, contain language that is undignified and abusive and the charge is made that the Court has been misled. The language of the opinion of the lower court, brief of defendant in error, pages 122 to 128, shows exactly what was in the mind of the lower court in passing sentence on the defendant without trial. The lower court understood fully the state of the record. The defendant had signed a written election to stand upon Section 97 of the Alaska Code of Criminal Procedure and refused to plead. The Court held that Section 97 had no application to a prosecution of this character, but in order to have the vital question involved in the case passed on by this court as soon as possible, sentenced

the defendant and made up a record which would bring the questions involved in this case, to the attention of the Appellate Court as soon as possible. We do not feel that this Court would be enlightened by a further discussion of the doctrine of public necessity, or by the use of abusive language, such as is found in the brief of the United States Attorney.

The record in this case consists of an indictment, demurrer and sentence, and presents a question of statutory construction, utterly devoid of any passion or feeling. The case has been brought to this court expeditiously, so that the government will not have an opportunity to claim that the defendant is seeking delay. (The statute of limitations will not expire for two years.)

We believe that the United States Attorney has led the lower court into serious error, and is attempting to keep the District of Alaska from having the benefit of the general principles of law applicable to the territories. The temper and tone of the brief shows that the United States Attorney fully realizes that he is wrong in his contention herein, and the language used at the latter end of the brief with reference to the abandonment of Section 1024 in the District of Alaska, in the prosecution of white slave cases, shows that either the United States Attorney or the Department of Justice itself, has decided that Section 1024 has no application to the territorial courts.

The discussion of the history of Section 1024 in

counsel's brief, is evasive. It is clear that the Act of Congress first containing Section 1024 had no application except in United States District and Circuit Courts, that subsequent legislation of Congress has never applied that Act to the territories, except with reference to *schedule of fees to be charged.* It must be remembered also in so far as the fees are concerned, that Section 1024 had no application to Alaska, because the United States Attorney there was never compensated in Alaska except by salary.

Respectfully submitted.

LEWIS P. SHACKLEFORD,
SHACKLEFORD & BAYLESS.

No. 2177

United States

Circuit Court of Appeals

For the Ninth Circuit.

C. M. SUMMERS,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Petition for Rehearing.

LOUIS P. SHACKLEFORD,

Attorney for Plaintiff in Error.

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FILED

In the United States Circuit Court of Appeals for the Ninth Judicial Circuit.

No. 2177.

C. M. SUMMERS,

Plaintiff in Error,

—against—

UNITED STATES OF AMERICA,

Defendant in Error.

Petition for Rehearing.

To the Honorable, the United States Circuit Court of Appeals for the Ninth Judicial Circuit.

Comes now C. M. Summers, plaintiff in error above named, and respectfully petitions this Court for a rehearing of the above-entitled cause and respectfully shows to the Court:

FIRST: That a rehearing of the above-entitled cause should be granted, for the reason that the third specification of error was not considered or discussed in the opinion of the Court; and, in support of this ground for rehearing your petitioner respectfully shows to the Court that under the rulings of the Supreme Court of the United States in the case of Callan vs. Wilson, 127 U. S. (page 540), Thompson vs. Utah, 170 U. S. (page 343), Rasmuson vs. United States, 197 U. S. (page 516), and Schick vs. United States, 195 U. S. (page 65), a judgment of conviction in a criminal case other than a petty offense is void unless supported by a verdict of a jury of twelve and a jury trial cannot be waived even by express stipulation. Under the decision in the case of Callan vs.

Wilson, *supra,* the question must either be decided in this case or in *habeas corpus* proceedings; that, for the sake of expedition and justice, this question should be decided in this cause and not left for decision through a multiplicity of suits.

SECOND: Your petitioner respectfully requests that a rehearing be had upon the ruling of this Court sustaining the ruling of the lower Court with reference to the petitioner's demurrer to the indictment, and your petitioner respectfully shows to the Court that the question involved in this case depends upon the question as to whether section 1024 of the Revised Statutes of the United States has application to the territories and territorial courts; and your petitioner respectfully urges and claims that under the rulings of this Court in Corbus vs. Leonhardt, 114 Federal (page 10), Jackson vs. United States, 102 Federal (page 473), and the rulings of the Supreme Court of the United States in the cases of Good vs. Martin, 95 U. S. (page 90), Thiede vs. Utah, 159 U. S. (page 510), Hornbuckle vs. Toombs, 18 Wall. (page 648), Reynolds vs. United States, 98 U. S. (page 145), the law is that all general statutes of procedure found in the Revised Statutes which upon their face do not exhibit a specific intention on the part of Congress to have them apply to the territorial courts, are presumed to apply only to procedure in Federal, Circuit and District Courts.

And your petitioner further requests a rehearing upon the questions raised by the demurrer to the indictment, upon the ground that this Court has failed to consider that portion of the Act of May 17, 1884,

providing for civil government for Alaska, which placed the district attorneys for Alaska upon a salary and made those statutes relating to the fee system and the conduct of district attorneys in connection therewith inapplicable to Alaska.

Your petitioner further shows that this Court has failed in its opinion to consider the provisions of the Act of March 4, 1909, being the new Penal Code of the United States, under chapter entitled "Certain offenses in the Territories," and that section of that chapter which permits the joinder in one indictment of only certain offenses therein named.

Petitioner further asks to be made a part hereof a brief of his attorney in support of this petition, which will be filed herein.

C. M. SUMMERS,
Petitioner.
By LEWIS P. SHACKLEFORD,
His Attorney.

The undersigned, one of the attorneys for the petitioner, C. M. Summers, hereby certifies that in his judgment the foregoing petition is well founded and that it is not interposed for delay.

LEWIS P. SHACKLEFORD.

No. 2177

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit.

C. M. SUMMERS, *Plaintiff-in-Error,* vs. THE UNITED STATES OF AMERICA, *Defendant-in-Error.*	

BRIEF OF PLAINTIFF IN ERROR IN SUPPORT OF PETITION FOR RE-HEARING.

LEWIS P. SHACKLEFORD,
Attorney for Petitioner.

FILED
APR - 9 1913

IN THE

United States Circuit Court of Appeals,

FOR THE NINTH JUDICIAL CIRCUIT.

C. M. SUMMERS, *Plaintiff-in-Error,* *against* UNITED STATES OF AMERICA, *Defendant-in-Error.*	**Brief Supporting Petition for Rehearing.**

As attorney for the petitioner herein, the writer of this brief feels that a serious responsibility rests upon him for the conduct of this case, which has apparently ended in a final judgment against the petitioner whereby he is sentenced to five years imprisonment without having had any trial whatever in the premises.

It was upon advice of the writer of this brief that the defendant herein refused to plead and stood upon his demurrer. It was upon the rulings of this court in several cases involving identically the same principle involved in this case particularly the ruling in this court in the case of *Corbus* v. *Leonhardt,* 114, Federal (page 10), that the writer assumed the responsibility of advising the defendant to stand upon his demurrer.

In the opinion rendered on the 3rd of February, 1913, in this case, this court reverts to the case of *Page* v. *Burnstein,* 102 U. S. (page 664) as an authority sustaining the present ruling of this court. In the case of

Corbus v. *Leonhardt*, 114 Federal (page 10), the case of *Page* v. *Burnstein* was said by this court to have no application to Alaska.

In the brief of the United States Attorney filed in this court, at page 73, the United States Attorney used the following language:

> "The conflict of the *Page* case with that of *Corbus* v. *Leonhardt* is irreconcilable and manifest."

The use of *Page* v. *Burnstein* in this case as an authority in support of the conclusions reached by this court must, without question, constitute a disproval of the case of *Corbus* v. *Leonhardt,* although the case of *Corbus* v. *Leonhardt* had been deliberately and maturely considered many years after the decision of the Supreme Court of the case of *Page* v. *Burnstein.*

If the petitioner in this case, then, is to suffer imprisonment without trial, it is due in a very large extent to the assurance which the writer of this brief felt that this court would not reverse its own previous decisions. There are two questions involved in this case. The First, which was not discussed in the opinion of this court, is the question as to whether a judgment in a criminal case for anything other than a petty offense can be sustained unless the record shows that the defendant was tried by a jury, and further that, even where a jury trial is waived, in law a jury trial cannot be waived in a criminal case.

The Second: Does section 1024 have application as a statute of procedure in the Territory of Alaska:

Before discussing the questions a few preliminary remarks are necessary. It must be remembered that when the indictment in this case was returned, with one possible exception this was the first indictment returned in Alaska in which more than one offense had been charged and naturally counsel for the defendant in this case, in view of the ruling of this court in *Corbus* v. *Leonhardt* looked upon the effort of the district attorney as an

attempt to prejudice the defendant without authority of law or precedent, by heaping upon him in one case fifty-six separate charges. The last offense in point of time charged in the indictment occurred in the month of June, 1911, and the other offenses charged dated back from month to month for a period of three years.

The case was pending in the lower court only four months after the indictment was found and was then removed to this court. It was argued and submitted at the next session after the judgment of the lower court had been entered. A reversal of the case would not have meant defeat to the district attorney, as only one year had elapsed between the time of the finding of the indictment and the time this court filed its opinion affirming the proceedings in the lower court, so that the government would not even now be seriously injured if the demurrer had been sustained, provided they had a meritorius case to submit to the next grand jury. More than half the charges laid are still unbarred by the Statute of Limitations so that there is nothing in the claim of the Government that a favorable ruling to the United States is necessary to the accomplishment of substantial justice. The charge was made by the district attorney in his brief upon the writ of error in this case, that the defendant had no right to claim his constitutional privilege of jury trial for the reason that he and his attorney had waived the right to jury trial and an effort was made to censure the writer of this petition for raising the question in the Appellate Court.

In the case of *Schick* v. *United States,* an effort was made by attorneys for the government and by attorneys for the defendant to suppress the question of the right to jury trial, an express written stipulation having been made by the parties waiving a jury, and the Supreme Court of the United States in that case, 195 U. S. (page 67), used the following language:

> "In each case the parties in writing waived a jury, and agreed to submit the issues to the court. * * *

> The waiver of a jury was not assigned as error, nor referred to by counsel at the hearing before us, either in brief or argument. The question of its effect was suggested by this court and briefs called for from the respective parties."

Several of the cases hereinafter cited are cases where a specific written stipulation was made between the parties waiving their right to jury trial and the courts have uniformly held that they must nevertheless entertain the question as to whether such proceeding is within the jurisdiction of the court, and the uniform holding has been that a written stipulation even can have no effect upon the right of the defendant to a jury and that the judgments involved are void in criminal cases. This is a right which the courts universally recognize.

In view of the fact that the writer of this brief advised the petitioner in this case to refuse to plead and stand upon his demurrer, and that the petitioner in this case has been deprived of his right to jury trial, not of his own volition but on account of the advice which counsel had given, based upon the case of *Corbus* v. *Leonhardt* and the other cases cited therein, we feel no hesitancy in discussing the question previously discussed on page 73 of the brief of plaintiff-in-error under the head of "Third Specification of Error."

First Point.

The record in this case affirmatively shows that the defendant was charged with a serious crime, that he has never pled guilty thereto, and that he has been convicted without trial. The opinion of this court shows that this question has not been considered or discussed in reaching the conclusion announced in the opinion of February 3rd, 1913.

Upon this question the following is the state of the law in the Supreme Court of the United States:

In the case of *Callan* v. *Wilson,* 127 U. S. (page 540), the defendant was charged with the crime of conspiracy in the police court of the District of Columbia and convicted by the judgment of that court without a jury and sentenced to a fine of $25. The defendant appealed his case and then defaulted in the payment of his fine and withdrew the appeal, went to jail and sued out a writ of habeas corpus against the United States Marshall for the District of Columbia. It was held that the offense with which he was charged was a crime and that the judgment of the lower court was void, not having been supported by the verdict of a jury and the Supreme Court ordered the discharge of the appellant from custody.

One of the most recent cases upon the question of the right to jury trial is the case of *Schick* v. *United States,* 195 U. S., and we find in the opinion of the court at page 70, the language of *Callan* v. *Wilson* quoted with approval. The following is the language:

> "Except in that class or grade of offenses called 'petty offenses,' which, according to the common law, may be proceeded against summarily in any tribunal legally constituted for that purpose, a guarantee of an impartial jury to the accused in a criminal prosecution or by or under the authority of the United States secures to him the right to enjoy that mode

of trial from the first moment and in whatever court he is put on trial, for the offense charged."

In the case of *Schick* v. *United States* above cited, the Supreme Court of the United States held that in a prosecution under section 11 of the oleomargarine act, which reads as follows: ("That every person who knowingly purchases or receives for sale any oleomargarine which has not been branded or stamped according to law, shall be liable to a penalty of $50 for each such *offense.*") The defendant was really not charged with a crime but with a petty *offense;* therefore, under the ruling in the case of *Callan* v. *Wilson, supra,* a jury may be waived. Mr. Justice Brewer in his opinion further discusses the provisions of the Constitution with reference to jury trial and demonstrates that the original draft of the Constitution as reported to the convention, provided as follows:

> "The trial of all criminal *offenses* shall be by jury,"

and shows that by unanimous vote the draft of the constitution was amended so as to read "The trial of all *crimes,*" and under the peculiar circumstances of that case, which simply involved the payment of a fine of $50, it was held that the defendants were charged with a petty offense only.

It is unnecessary to discuss at length the case of *Rasmusson* v. *United States,* 197 U. S. (page 516), with which this court must be familiar. It is sufficient to say the Act of Congress providing a criminal code for Alaska was declared unconstitutional insofar as it reduced the number of jurors required for the trial of a misdemeanor, from twelve to six.

The decision in the Case of *Thompson* v. *Utah,* 170 U. S. (page 343), is determinative of the question involved in this case.

While we ask an examination of all these authorities, we take the liberty of quoting the following language from the opinion:

> "It is said that the accused did not object until after verdict to trial by jury composed of eight persons; therefore he should not be heard to say that his trial by such jury was in violation of his constitutional rights. It is sufficient to say that it was not in the power of accused felon, by consent expressly given or by his silence, to authorize a jury of only eight persons to pass upon the question of his guilt."

We especially ask the court to read in this connection also the case of *Cancemi* v. *People,* 18 N. Y. (page 131). In this case one of the twelve jurors was withdrawn upon the express consent and stipulation of the prisoner and he was tried by eleven jurors. Among other things, in discussing the case, the court said the following:

> "If the deficiency of one juror may be waived there appears to be no good reason why a deficiency of eleven might not be and it is difficult to see why the entire panel might not be dispensed with and the trial committed to the court alone."

In discussing the early English cases, the court used the following language:

> "The opinion of the judges in the court of the King's Bench in the case of Lord Dacres, tried in the reign of Henry VIII for treason strongly fortified the conclusion above expressed. One question in the case was whether a prisoner might waive a trial by his peers and be tried by the country, and the judges agreed that he could not, for the statute of Magna Charta was in the negative and prosecution was at the King's suit. Woodeson in his lectures (Vol. 1, page 346) says the same question was resolved on the arraignment of Lord Audley in the seventh year of the reign of Charles I, and that the reason was that the mode of trial was not so broadly

a privilege of the nobility as a part of the law of the land, like the trial of commoners by commoners enacted or rather declared by Magna Charta. In 3 Inst. 30 the doctrine is stated that 'a nobleman cannot waive his trial by his peers and put himself upon the trial of the country, that is, of twelve freeholders; for the statute of Magna Charta is that he must be tried *per pares,'* and so it was resolved in Lord Dacres' case."

A lengthy brief, citing the cases in which the question now being discussed is involved, is unnecessary, for the reason that the matter is thoroughly digested in a most exhaustive footnote to the case of Re *McQuown,* found in the 11th L. R. A., new series, at page 1136. The following is the statement of the digester.

"Although the contrary has been asserted many times, yet, when confined to cases involving the waiver, by one charged with a crime, of a trial by jury, as distinguished from other questions, such as consenting to trial by a less number of jurors than provided by the constitution, the waiver of the disqualification of certain jurors and the like, *the proposition may be safely asserted that the courts are unanimous in holding that, as to felonies, in the absence of statutory authority, a defendant cannot waive a jury trial and an attempt to do so followed by a trial before the court without a jury will be of no avail, and a judgment rendered by the court will be erroneous if not void."*

In the note above quoted are collected all of these cases bearing upon the subject. In our reply brief on file herein at p. 3 the decision of the Circuit Court of Appeals for the First Circuit in the case of *Kelleher* v. *United States,* 193 Fed. 8, is cited and extensively quoted. That authority settles without question the proposition that a violation of the National Banking Act with which defendant in this case is charged is a felony, since the passage of the penal code act of March 4, 1909, 35 Statutes at Large, p. 1088.

We respectfully submit that in view of the fact that the questions involved in this case must arise now or later; upon Habeas Corpus as in *Callan* versus *Wilson*, that this cause be set down for reargument and that not less than two hours on a side be allowed for presentation or that questions involved herein be certified by this court to the Supreme Court.

Second Point.

Section 1024 of the Revised Statutes of the United States has no application to the territories. General Statutes of Procedure found in the Revised Statutes of the United States were not intended to apply to the territories and it is presumed that they do not apply to the territorial courts unless a specific intention to the contrary is expressed in the Statute.

We respectfully submit that the opinion of this court shows that it is doubtful whether 1024 applied to the territories but that the position taken by this court in its opinion is that it cannot be said that 1024 *did not apply to the territories.* That is to say in discussing the case the burden was thrown on the plaintiff-in-error to show conclusively that 1024 did not apply to the territories. We believe the rule to be that general statutes of procedure passed by Congress without specifically mentioning the territories must be presumed to apply only to United States Circuit and District Courts and not to territorial courts. This was the question discussed in the case of *Clinton* v. *Englebrecht,* 80 U. S., p. 434, wherein the court used the following language:

> "The regulations of that act (referring to the Judiciary Act) requiring the selection of jurors had no reference whatever to the territories. They were framed in reference to the states and cannot without violation of the rules of construction be made to apply to the territories of the United States. *If, then,* this subject was not regulated by territorial law it would be difficult to say that the selection of jurors had been provided for at all in the territories."

In the case of *Good* v. *Martin,* 95 U. S., at p. 90, the Supreme Court of the United States used the following language:

> "Territorial courts are not courts of the United States within the meaning of the Constitution as

appears by all the authorities: '*Clinton et al.* v. *Englebrecht*, 13 Wall. 434, *Hornbuckle* v. *Toombs*, 18 Wall. 648.' A witness in civil cases cannot be excluded in Courts of the United States *because* he or she is a party to or interested in the issue tried; but this provision has no application in the Courts of a Territory where a different rule prevails.''

We take the liberty of asking this court, by comparing Section 1024 which is under discussion in this case with Section 858 which was under discussion in the case of *Good* v. *Martin*, and *Corbus* v. *Leonhardt*, what distinction can this court point out showing an intention to limit the application of 858 on the part of Congress to a narrower application than that which would be attributed to Section 1024; the only answer that can be made by this court to this question is that Section 858 specifically referred to ''Courts of the United States,'' and that Section 1024 did not refer to any particular courts, but simply established a rule of procedure. This court cannot make such an answer to the following question:

> ''How can the case of *Thiede* v. *Utah*, 159 U. S., p. 510, be distinguished from the case at bar?''

In the Thiede case last cited the courts were dealing with the application of Section 1033 of the Revised Statutes. Section 1033 does not refer to courts of the United States or to any court but simply provides a rule of procedure in capital and treason cases. It (*Section 1033*) *is more general in its application, and more general in its scope of language than Section 1024.* In discussing the Thiede case the Supreme Court of the United States used the following language:

> ''By 1033 Revised Statutes the defendant in a capital case is entitled to have delivered to him at least two entire days before the trial a copy of the indictment and a list of the witnesses to be produced on the trial. *Logan* v. *United States,* 144 U. S., 263. But this section applies to Circuit and District

> Courts of the United States and does not control the practice and procedure of the courts of Utah which are regulated by the statutes of that territory. This question was fully considered in *Hornbuckle* v. *Toombs,* 18 Wall. 648, and it was held, overruling prior decisions, that the pleadings and procedure of the territorial courts, as well as their respective jurisdictions, were intended by Congress to be left to the legislative action of territorial assemblies and the regulations which might be adopted by the courts themselves. See also *Clinton* v. *Englebrecht,* 13 Wall, 434, in which it was held that the selection of jurors in the territorial court was to be made in conformity to the territorial statutes; *Good* v. *Martin,* 95 U. S., 90, in which a later ruling was made as to the competency of witnesses against *Reynolds* v. *United States,* 98 U. S., 145, where the same rule was applied to the impanelling of grand jurors and the number of jurors. Also *Miles* v. *United States,* 103 U. S., 304, a case coming from the Territory of Utah, in which the same doctrine was applied in regard to the mode of challenging petit jurors."

The reason we say above that 1033 is more general in its scope than 1024 is this, 1024 was passed under a title and preamble that showed an intention to have 1024 apply only to United States Circuit and District Courts *in the several states* and that subsequent legislation showed that the act which contained 1024 in so far as fee provisions were concerned was extended only to certain territories *named* in subsequent legislation of Congress. It is admitted in the opinion of this court that the territories named were not all the territories then in existence. It also appears that in Alaska so far as District Attorneys were concerned the fee system never applied, the district attorneys were on salary. (Act May 17th, 1884 30 Stat. L., pp. 25-27, Sec. 9). "They shall receive respectively the following annual salaries. The Governor, the sum of three thousand dollars, the attorney, the sum of two thousand five hundred dollars."

The statute from which Section 1033 was drawn is found at page 112, Volume 1 of the Statutes at Large, entitled as follows:

> "Chapter 9. An act for the punishment of certain crimes against the United States."

The first section denounces the levying of war against the United States by persons owing allegiance thereto. The second section refers to the same subject. The third section reads as follows:

> "And be it further enacted that if any person or persons shall within any fort, dock-yard, magazine, or in any other place or district or country, under the sole and exclusive jurisdiction of the United States, commit the crime of wilful murder, such person or persons on being thereof convicted shall suffer death."

This is the very section under which Fitzpatrick was successfully prosecuted for murder in the case of *Fitzpatrick* v. *United States,* 178 U. S., page 304, the murder having been committed in the District of Alaska and the Supreme Court holding that the procedure was controlled by the Oregon statute although the murderer was punishable under the act just quoted. Sections 4, 5, 6, 7, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27 and 28 denounced the crimes of misprison of felony, of manslaughter, piracy, maiming, forgery, stealing, larceny, receiving stolen goods, perjury, bribery, obstruction of process, rescue of convicted persons and like crimes. None of these crimes are limited in their application to the territorial limits of the states and without doubt apply to the territories. *Section 29 of this act is the section that is now Section 1033 of the Revised Statutes which was discussed in the Thiede case and held inapplicable to the territories.* We have been unable to find in the act any expression limiting the provisions of the act to proceedings in the United States Circuit and District Courts. Nevertheless the Supreme Court of the

United States held that in the Section which concerned procedure the act must be considered as having been intended to furnish a rule of procedure for United States Circuit and District Courts in the states only as distinguished from courts of the territories. How then can this court hold Section 1024 to apply to the territory without disregarding the entire process of reasoning applied in the case of *Thiede* v. *Utah.* It seems to us that this is a parallel and deserves the most serious consideration if the doctrine of *stare decis* has any real sanctity. We respectfully request the court to examine the act construed in the Thiede case and found as above cited, page 112, Volume 1 of the United States Statutes at Large.

We feel sure that a reconsideration of the present case can lead to nothing but the best results. The case was argued briefly and the argument did not develop fully the basic principle involved in all of the rulings of the Supreme Court cited by the plaintiff-in-error, namely, that the statutes of procedure of the United States are not really in conflict with the statutes adopted for the territories, because, while they may set up a different procedure, they are intended to apply to different courts. An examination of all the cases last cited and all of the cases heretofore decided in the Circuit Court of Appeals for the Ninth Circuit will show without question that the real reason assigned in each instance was that the general statutes of procedure in the United States were intended to regulate forums other than the territorial courts; if Section 1024 is to be considered not as a special statute intended to apply to territorial courts but as an ordinary statute of procedure then it would be considered to apply only to United States Circuit and District Courts.

There is, however, another matter which was not discussed in the opinion of this court and which, perhaps, was not sufficiently discussed in the brief of the petitioner when the case was submitted, namely, the act of

Congress approved March 4, 1909, known as the new Penal Code, 35 Statutes at Large, p. 1088. In view of the seriousness and importance of this case we take the liberty of copying Chapter 13 of that act:

"CHAPTER THIRTEEN.

CERTAIN OFFENSES IN THE TERRITORIES.

SECTION 311. Except as otherwise expressly provided, the offenses defined in this chapter shall be punished as hereinafter provided, when committed within any territory or District, or within or upon any place within the exclusive jurisdiction of the United States.

SECTION 312. Whoever shall sell, lend, give away, or in any manner exhibit, or offer to sell, lend, give away, or in any manner exhibit, or shall otherwise publish or offer to publish in any manner, or shall have in his possession for any such purpose, any obscene book, pamphlet, paper, writing, advertisement, circular, print, picture, drawing, or other representation, figure or image on or of paper or other material, or any cast, instrument, or other article of an immoral nature, or any drug or medicine, or any article whatever, for the prevention of conception, or for causing unlawful abortion, or shall advertise the same for sale, or shall write or print, or cause to be written or printed, any card, circular, book, pamphlet, advertisement, or notice of any kind, stating when, where, how, or of whom, or by what means, any of the articles above mentioned can be purchased or obtained, or shall manufacture, draw, or print, or in anywise make any of such articles, shall be fined not more than two thousand dollars, or imprisoned not more than five years or both.

SEC. 313. Every person who has a husband or wife living, who marries another, whether married or single, and any man who simultaneously, or on the same day, marries more than one woman, is guilty of polygamy, and shall be fined not more than five hundred dollars and imprisoned not more than five years. But this section shall not extend to any person by reason of any former marriage whose hus-

band or wife by such marriage shall have been absent for five successive years, and is not known to such person to be living, and is believed by such person to be dead, nor to any person by reason of any former marriage which shall have been dissolved by a valid decree of a competent court, nor to any person by reason of any former marriage which shall have been pronounced void by a valid decree of a competent court, on the ground of nullity of the marriage contract.

SECTION 314. If any male person cohabits with more than one woman, he shall be fined not more than three hundred dollars, or imprisoned not more than six months, or both.

SEC. 315. COUNTS FOR ANY OR ALL OF THE OFFENSES NAMED IN THE TWO SECTIONS LAST PRECEDING MAY BE JOINED IN THE SAME INFORMATION OR INDICTMENT."

Can it be said that the paragraph above referred to which permits the joinder of counts in an indictment only of certain specified offenses in the territory does not impliedly prohibit the joinder of any other offenses? Can it be said that the section of the statute referred to italicized above has absolutely no meaning whatever?

At the risk of being tedious and in view of the importance of this case, we desire to ask the court to again read the reply brief, on file herein, from pages 4 to 10, and particularly to read again the Act of Congress of July 22, 1813, copied at page 7. All through the title "Judiciary" of the Revised Statutes of the United States will be found sections relating to procedure where the courts of the territories are mentioned and application is given by specific reference to the courts of the territories. Must it not then be assumed that any statute of the United States concerning procedure has by custom been understood to apply to the courts of the territories only when the courts of the territories are named in the statute?

The writer of this brief feels a very serious responsibility for the manner in which this case has been conducted in the court below. The responsibility is partly

chargeable to the writer of the brief but in view of all of the authorities above submitted I desire to say that it would be an unconscionable thing, no matter how an attorney may have mismanaged a criminal case, for a court to sustain a sentence wherein the defendant has had no testimony adduced against him. I believe that this court in considering this petition for re-hearing must feel a very grave responsibility, and must feel that questions of the greatest importance are involved in the case which, for the sake of expedition, justice and more thorough consideration, should be reargued.

Very respectfully submitted,

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